THE VICEROY AND GOVERNOR-GENERAL OF INDIA

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THE VICEROY AND GOVERNOR-GENERAL OF INDIA

BY

A. B. RUDRA, Ph.D.

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FOREWORD

DR RUDRA has written by far the best treatise known to me upon what is certainly among the half-dozen most important offices in the gift of the British Crown. His sober and careful narrative is, I think, long likely to remain the standard treatise for the period that it covers. It is, indeed, unique in its field ; and having seen it at every stage in its preparation, I can bear testimony to the fact that Dr Rudra has spared no effort to draw a comprehensive and accurate picture.

The Viceroy of India holds an office that is clearly *sui generis*. He cannot be compared to the British Prime Minister, partly because he is subordinate to control in London, and partly because he is the master of his advisers in India. He cannot be compared to the President of the United States, though there is a real analogy between the two positions ; for his relations to his council resemble with some closeness that of the President to his cabinet, while his relations to the British Government are not unlike those of the President with a Congress anxious to move in step with him. His functions are entirely different from those of the Governor-General in a Dominion ; for the latter, unlike the Viceroy of India, has become, especially since the Statute of Westminster, a dignified emollient rather than a source of active power. But the Viceroy retains immense influence on every aspect of Indian policy with which he chooses to concern himself ; and, in many fields, it would be difficult indeed not to leave him a vital share in the ultimate decisions that are made. Yet it is also true to say that, however immense that influence, and however vital that share, he works within a larger frame-work over which London retains the control ; and the classic instance of Lord Curzon's career makes it plain that on issues of essential difference the keys of power are in London and not in Delhi.

Dr Rudra's book brings out admirably at once the wide ambit of the Viceroy's functions, and their extraordinary delicacy. As one surveys them, one is tempted to argue that

a Viceroy who proposed actively to concern himself with their whole range would need something like Napoleon's genius for the technique of administration. The secret, I take it, has lain partly in the art of delegation and partly in that capacity to judge men which has always been the outstanding quality of every holder of the office who can claim success in it. These have been, I suspect, fewer in number than we have been content to imagine; though there is a vital sense in which the absence of outstanding errors in as difficult a task may already be accounted a success.

Dr Rudra's second part will, I think, be found of exceptional interest at the present time. My own judgement is that it will rapidly become more obsolete than the earlier section of his book. Events in India are moving at an immensely rapid pace; and the pressure of that pace upon the Vice-regal position is likely, I believe, to call for drastic changes in the fairly immediate future. India, as certain cautious remarks of Dr Rudra's make evident, grows every day more politically self-conscious; and each step in the deepening of that temper looks towards a Viceroy ever less likely to retain the authority the Act of 1935 deemed necessary. As the centre of decision moves from London to Delhi the Vice-regal position will tend more and more to approximate to that of the Governor-General of a British Dominion; and I suspect that, within perhaps a decade, the main field of his influence will be the building of necessary bridges between a self-governing British India and the India of the Princes. The position will be less vital than now; but I do not think it will on that account be less delicate. Indeed, it is worth emphasizing that one of the most considerable services the Viceroy of today can render to the India of tomorrow is to prepare the minds of the Princes for those changes in the structure and functioning of their states which have been so long overdue. A Viceroy who was successful in this effort would indeed have an eminent place in the history of India.

HAROLD J. LASKI

London

February 16th, 1940

PREFACE

THIS book is the result of research work in the London School of Economics and Political Science during the sessions 1936-37 and 1937-38. It is a historical and analytical study of the position of the Viceroy and Governor-General in the Indian constitutional system. The historical treatment is designed to help to a full understanding of his present position. An attempt has been made to indicate the changes that have taken place in the position of the Governor-General both in relation to the Home authorities and in his own environment. Adequate emphasis has been given to practice as well as to law. Indeed, all through the work the twin aspects of law and practice have constantly been kept in mind.

The book is divided into two parts. Part I deals with the position of the Governor-General under the Montagu-Chelmsford Reforms of 1919. In Chapters 1 and 2 the appointment and tenure of the Governor-General and his legal status have been fully discussed. In Chapter 3 I have discussed the sources and nature of the powers of the Governor-General. The Governor-General does not act in a vacuum. He stands at the head of a highly complex system. For a proper appreciation of the actual position of the Governor-General it is necessary to have a clear conception of the machinery in and through which he functions. Chapters 4 to 10 are, therefore, devoted to a study of this machinery. The part actually played by the Governor-General in the administration of the various Departments of the Government of India, his relations with Secretaries and Members, the nature and business of the Executive Council and the place therein of the Governor-General, all these topics have been treated comprehensively. In order to complete the picture, the position of the Secretary of State *vis-à-vis* the Government of India has been carefully examined in Chapters 11 and 12. Finally, in Chapter 13 I have made a full and critical examination of the use actually made by the Governor-General of the

extraordinary powers vested in him : the power of disallowing adjournment motions, the power of ordinance-making and the power of legislation by certification.

Part II of the book is devoted to an estimate of the place assigned to the Governor-General by the Government of India Act, 1935. The salient features of the Act are described in Chapter 14. The powers and duties of the Governor-General under the Act—at once varied, complex and delicate—are considered in the next two chapters. The place of the Governor-General in the Federal Executive, his relations with Ministers and Councillors, the nature of responsibility in the Centre—these are treated at length in Chapter 17. The last chapter is concerned with the changed position of the Secretary of State under the new constitution.

My aim has been more to explain than to criticize. In the criticisms that I have offered I have tried, as best I could, to give an unbiased picture. I have sought to let the facts speak for themselves, keeping myself as far as possible in the background.

As this work was nearing publication the war began. Shortly afterwards the Viceroy announced the suspension of preparations in connexion with the inauguration of the Federal part of the Act of 1935. The new constitution, particularly the scheme of federation which it embodies, has from its very inception been most strenuously and bitterly criticized in India. Part of the hostility to the Act is no doubt born of misunderstanding ; yet a good deal of it is, I believe, well founded. The outbreak of the war must render inept the self-complacent attitude of responsible British politicians towards the Government of India Act, 1935. It must necessarily compel a radical reconsideration and revaluation of the Indian constitutional question. It is, therefore, a pity that the gesture from the Congress, particularly from its great leader, Mahatma Gandhi, should have evoked a poor and unimaginative response from the British side. The political situation in the country is steadily deteriorating. All those who feel that an honourable understanding between Great Britain and India is possible and is to the mutual benefit of both countries, and I am one of them, would ardently hope for some supreme manifestation

of generous statesmanship on the part of the British Government. Such action, if not too late, would, I am sure, evoke an equally generous response from India also. That will not only be of permanent benefit to India ; it will also mean a tremendous accession of strength, moral and material, to Britain's cause against Germany, the value of which would be inestimable.

It is now my pleasant duty to acknowledge obligations to those whose help I have received in the preparation of this book. I am deeply grateful to Professor Harold Laski, whose constant encouragement, generous appreciation and stimulating suggestions have been of immense benefit to me. His readiness to introduce this work to the public adds to my obligations to him. I must also express my sincere gratitude to Sir Vernon Dawson, K.C.I.E., of the India Office. In the course of the preparation of this work I consulted him on numerous occasions, and he also favoured me by reading the whole of this work in manuscript. I must, however, make it clear that Sir Vernon's help was confined to well-understood limits, and that he is not, as indeed no one but the author is, responsible for any of the opinions expressed or statements in this book. I am thankful to the Right Hon. Sir Tej Bahadur Sapru, K.C.S.I., for discussing with me, with all his learning and courtesy, a number of important points and for encouraging me in my work.

I am thankful to the Marquess of Lothian, C.H., for giving me the opportunity of discussing with him certain fundamental principles ; to Dr W. I. Jennings, LL.D., Reader in English Law in London University, for reading two of my chapters in manuscript and giving me the benefit of his critical acumen ; to Mr J. Coatman, C.I.E., late Director of Public Information, Government of India, for certain suggestions toward the improvement of this book ; to Professor G. H. Langley, formerly Vice-Chancellor of the University of Dacca, for reading portions of the manuscript and giving helpful suggestions, and to the Finance Department, Government of India, for supplying information on certain matters. Above all, I am grateful to a fairly large number of gentlemen, English as well as Indian, who held or are holding high offices

in India, for enabling me to form a picture in my own mind of the living machinery of the Indian Government. Their helpful spirit I can only acknowledge. The amount of trouble I gave them and the benefit I derived from them will be evident from the casual remark of one of them at a social function, when, in absolute good humour, he referred to me as the young man who had cross-examined him for two hours on a past occasion. I must also thank my cousin, Rai Bahadur P. B. Rudra, Principal, Chittagong College, Bengal; my friend, Mr. J. N. Choudhury of the Department of English, Dacca University; and my father-in-law, Mr D. C. Biswas, Retired District and Sessions Judge, Bengal, and now judge of Mayurbhanj State High Court, each of whom read considerable portions of the proofs and made suggestions for literary improvements.

I am thankful to the Oxford University Press for readily agreeing to undertake the responsibility of the publication of this book. To the Senate of the University of London I am grateful for making a handsome grant towards the publication of my thesis out of the Publication Fund of the University. My thanks are also due to the Library staffs of the London School of Economics and Political Science, the India Office, the Dominion Office, and the High Commissioner for India, particularly the last.

The publication of the book has been delayed much beyond expectation. The thesis was approved in July 1938, but I was not able to hand over the manuscript to the publishers until early in 1939. Normally the book would have been published by the end of last year. The outbreak of war has inevitably delayed its appearance by some months, though my publishers have spared no effort to expedite it.

NOTE.—While going through the proofs, I found it necessary to add one or two new matters in order to bring the book up to date. On 1 September last the hands of the Government of India were strengthened by the passage of the Government of India Act (Amendment), 1939. During the emergency of war this Act makes the Central Government legally competent to issue instructions to the Provincial

Governments as to the exercise of their own executive power, and entitles the Central Legislature to pass Acts (under sec. 102 of the Act of 1935, see pp. 281-2) on Provincial subjects conferring powers on the officials of the Central Government. Another Act (The Government of India Act, 1935, Miscellaneous Amendments Act, 1940) has recently been passed making the financial position of the Centre as against the Provinces stronger than before.

Owing to the failure of negotiations between the Congress and the British Government on the issues of the war, the Congress Governments in the Provinces have resigned, and, under sec. 93 of the Act of 1935, in seven out of the eleven Provinces autocratic rule by Governors has been prevailing.

The Reforms Office which was functioning as a temporary Department of the Government of India has just been abolished (1 March 1940), and has now become a part of the Secretariat of the Governor-General, the Reforms Commissioner being styled Secretary to the Governor-General (Reforms).

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12 March 1940

PART I

THE GOVERNOR-GENERAL UNDER THE MONTAGU-CHELMSFORD REFORMS

I

THE APPOINTMENT AND TENURE OF THE GOVERNOR-GENERAL

THE term 'Viceroy' has no statutory basis. Used for the first time in the Royal Proclamation of 1858, it appears in the Indian Warrant of Precedence and in the Statutes of the Knightly Orders; on the other hand the term 'Governor-General' has invariably been employed in all Acts of Parliament and of the Indian Legislatures, in the Royal Warrant of Appointment and in the Notification of Appointment in the *London Gazette*.[1] 'The distinction, therefore,' says Lord Curzon, 'is held to be that where the Governor-General is referred to as the statutory head of the Government of India he is designated Governor-General: where he is regarded as the representative of the Sovereign he is spoken of as Viceroy.'[2]

This distinction is in fact constantly blurred. Thus the Governor-General, while purporting to act in the exercise of the statutory powers conferred upon him as Governor-General, usually signs as Viceroy and Governor-General. For instance, the Governor-General frequently sends messages to the Indian Legislature or promulgates Ordinances and certifies Bills under the signature of 'Viceroy and Governor-General'. In public discussions also the two terms are indiscriminately used; the shorter one having a greater currency. The view of the Simon Commission[3] that 'the word "Viceroy", employed to describe the representative of the

[1] See, however, p. 5 below. It is well known that there was no office of Governor-General until 20 October 1774, when Hastings became the first Governor-General of Bengal. Bentinck was the first to take office as Governor-General of India on 16 June 1834. The Governor-General of India continued to be the Governor of Bengal as well until 1 May 1854, when the first Lieutenant-Governor of Bengal came into office. In Queen Victoria's Proclamation of 1 November 1858, Canning was distinguished from his predecessors by being referred to as 'Our first Viceroy and Governor-General'. This title has ever since been enjoyed by all occupants of the office.

[2] Curzon, *British Government in India*, vol. II, p. 49.

[3] *Indian Statutory Commission Report*, vol. II (Cmd. 3569), p. 196 n.

King-Emperor in relation to the Indian States, has become usual' is misleading. For, in the first place, when the term 'Viceroy' was first used, it applied and has since then applied to the Governor-General as much in his relation to British India as in his dealings with the Indian States. Secondly, in law and in practice, the Crown always dealt with the States through the medium of the Governor-General in Council and not that of the Viceroy. The fact that every Governor-General invariably held the Foreign and Political portfolio did not legally differentiate him in that regard from any member of his Executive Council. All decisions in respect of the Indian States ran in the name of the Governor-General in Council.

The Butler Committee recommended that in future the Viceroy, and not (as then) the Governor-General in Council, should deal with the Indian Princes on behalf of the Crown.[1] This view had the cordial approval of the Simon Commission,[2] and was endorsed by the Government of India[3] in the following words: 'It is, in fact, our considered opinion that the Governor-General should hereafter be appointed under the dual designation of Viceroy and Governor-General, and that his functions in regard to the exercise of paramountcy should be statutorily vested in him under the former designation.' This proposal was subsequently incorporated in the White Paper of 1933:[4] 'The powers vested in the Crown in relation to the States, and now exercisable through the Governor-General of India in Council, except in so far as they are requisite for Federal purposes and the Rulers have assented to their transfer to the appropriate Federal authority for those purposes, will be exercised by the Crown's representative in his capacity of Viceroy.' The offices of the Governor-General and of the Viceroy were to be distinct and separately constituted by Letters Patent, the Governor-General exercising in the capacity of Viceroy the powers of the Crown in relation to the States outside the Federal sphere.[5] The Joint

[1] *Indian States Inquiry Committee Report* (1929), pars. 67 and 106.
[2] *Indian Statutory Commission Report*, vol. II, par. 229.
[3] *Dispatch on Constitutional Reforms*, 20 September 1930 (Cmd. 3700), p. 192.
[4] *Proposals for Indian Constitutional Reform*, 15 March 1933 (Cmd. 4268), Introduction, par. 9.
[5] ibid., par. 10.

Committee[1] accepted the principle of a legal differentiation of functions, but modified the proposed method for implementing it. As the two offices would in practice be held by the same person, they rightly maintained 'that the title of Viceroy should attach to him in his double capacity'. The Government of India Act, 1935, therefore designates the head of the ~~Indian Federation~~ as Governor-General of India and the person dealing with the States on behalf of the Paramount Power as the Crown Representative. In the Act itself the term 'Viceroy' finds no place; but the Commission appointing Lord Linlithgow as Governor-General of India and Crown's Representative provides as follows: 'And We do hereby declare that so long as you shall hold the said offices you shall while in India bear in addition to the styles and titles of the said offices the style and title of "Our Viceroy".'[2] It thus appears that the title of Viceroy cannot be used when the Governor-General is out of India, for example, in Ceylon or Burma. It may also be noted that while the use of the term 'Governor-General' or 'Crown's Representative', as the case may be, in the exercise of the powers given by or under the Act is sufficient, the use of the single word 'Viceroy' cannot give validity to anything done thereunder. The term 'Viceroy' really emphasizes the ceremonial aspect of the office. It is, perhaps, an indication of status, rather than a term of law.

Passing to the question of the appointment of the Governor-General, we find that since the passage of the Act of 1858 the appointment has been formally made by the Crown. The Regulating Act of 1773 which created the Governor-Generalship of Bengal named its first incumbent.[3] But it provided that his successors were to be nominated by the Court of Directors of the East India Company.[4] Under the Charter Act of 1833 all vacancies in the office of Governor-General were to be filled by the Court of Directors, 'subject to the approbation of His Majesty, to be signified in writing by His Royal Sign Manual, countersigned by the President' of the Board of Control.[5] Thus

[1] *Joint Committee on Indian Constitutional Reform (1933-4)*, *Report*, vol. I, pt. i, par. 158.

[2] See par. 2. See Appendix C.

[3] Sec. 10. [4] Sec. 10. [5] Sec. 42.

in law the power of appointment was exclusively in the hands of the Company till the Act of 1833 came into force.[1] The Act of 1784 which created the Board of Control expressly debarred that body from ' nominating or appointing any of the servants of the Company '.[2] In practice, however, the Board had considerable influence in the matter of appointing the Governor-General. The Act of 1833 appreciably weakened the power of the Directors inasmuch as the Cabinet, through the President of the Board of Control, was now given by law a hand in the appointment of the Governor-General. The Act did, of course, still leave the initiative with the Directors, but the Cabinet was in practice having an increasingly powerful and effective voice in the matter. It became the general practice of the President to take the initiative by intimating to the Directors the name of the person whose appointment would receive the approval of the Crown. On occasion, however, the Court of Directors would take their rightful initiative by submitting their nomination to the Government.[3] ' Neither party was, however, in the position to ensure the acquiescence of the other, and the question was quite likely to resolve itself into a ding-dong battle between the two, in which in the last resort the Government possessed the superiority.'[4]

A change of Ministry would also have its repercussions on the choice of a Governor-General. Lord Heytesbury, for instance, was appointed as successor to Bentinck. On the eve of his departure for India, Peel was replaced by Melbourne as

[1] With the exception of Hastings' appointment by the Act of 1773.

[2] Sec. 17.

[3] cf. Curzon, *British Government in India*, vol. II, p. 75.

[4] ibid., p. 75. An apt illustration of the tug-of-war that often took place is offered by the appointment of Lord Minto. On Cornwallis's death Barlow, as senior Member of Council, succeeded as officiating Governor-General in October 1805, and was confirmed in his post by the Court of Directors on 25 February 1806. The Whig Government which now came into power refused to assent ; the Directors would not, however, recall Barlow. Eventually the Ministry had Barlow's appointment vacated by the Crown. The Directors on their part refused to consider the case of Lord Lauderdale, the Government nominee, who, however, saved an ugly situation by withdrawing from the field. This is indeed a very rare instance of the victory of the Court of Directors on the question of an Indian appointment. Even so, their victory was partial, for they were unable to get their own nominee appointed. In the end a compromise was arrived at by the selection of Minto. ibid., pp. 84-7.

Prime Minister. Heytesbury's appointment was cancelled and eventually Auckland was appointed.[1]

With the abolition of the Company, duality in the appointing authority came to an end. The power of appointing the Governor-General passed into the hands of the Crown. The parties concerned are, therefore, the King, the Prime Minister, the Secretary of State for India, and the Cabinet. The part played by each of them in the actual selection depends in every case upon the personality of the Prime Minister concerned. 'I have known cases,' observes Curzon, 'and others are recorded in published Memoirs, where prolonged discussions took place in Cabinet upon the merits of a suggested candidate or candidates. I have known other cases where the Prime Minister consulted a few of his colleagues before making his submission to the Sovereign. . . . The tendency, as Cabinets have grown in size to their recent unwieldy dimensions, is unquestionably to treat important appointments less and less as matters for Cabinet discussion, and more and more as falling within the province of the Prime Minister, relying upon such advice as he may choose to seek.'[2] Normally, the Prime Minister would consult the Secretary of State for India in the first instance. Sometimes the latter might take the initiative. The name of Lord Irwin (now Viscount Halifax) was suggested to the Prime Minister by the late Lord Birkenhead, Secretary of State for India. '. . . In the end and after deep consideration, I only submitted two names to the Prime Minister', wrote Birkenhead to Lord Reading, then Viceroy of India.[3] In a debate in the House of Lords, Birkenhead said: 'I had the honour of first recommending his (Lord Irwin's) name to the then Prime Minister.'[4] Speaking in the House of Commons Mr (now Earl) Baldwin said: 'Let me tell the House that when it became my duty to submit a name to His Majesty for the Viceroyalty of India, Lord Birkenhead, then Secretary of State for India, and I discussed that matter at length, and passed in review many names.

[1] cf. Curzon, *British Government in India*, vol. II, p. 91.
[2] ibid., p. 62. Often he would seek advice outside the Cabinet.
[3] Letter dated 29 October 1925. See Birkenhead, *Frederick, Earl of Birkenhead*, vol. II, pp. 249-50.
[4] *House of Lords Debates*, vol. LXXV, col. 400.

. . . It was only when we had considered many names that he suggested the name of Mr Edward Wood . . .'[1]

There have been cases, though such cases are presumably rare, where the Secretary of State for India was altogether ignored. Curzon speaks from his personal knowledge of 'one case where he [the Secretary of State] was not even informed until after the appointment had been made by the Prime Minister and the Sovereign in combination'.[2] It is believed that Mr Wedgewood Benn, Secretary of State for India in Mr Ramsay MacDonald's second Administration, was wholly unaware of the choice of Lord Willingdon as Viceroy until it was decided upon. On the contrary, a strong Secretary of State may have a decisive voice. The rejection of the claims of Lord Kitchener for the office of Governor-General was primarily due to the stubborn opposition offered by Lord Morley, although that veteran soldier was favoured by the King, the Prime Minister and a large section of the public.[3]

The Sovereign may occasionally influence the appointment. Since the Viceroy is his personal representative the King might object to being represented by a person whom he considered unworthy of the office. Professor Keith remarks that, in view of the humble origin and Jewish religion of Lord Reading, 'the King might unquestionably have declined to accept the recommendation'[4] of Mr Lloyd George. Lord Moira (afterwards Marquess of Hastings) is supposed 'to have received the

[1] *House of Commons Debates*, vol. CCXXXI, col. 1305. On the question of a successor to Northbrook, Disraeli wrote to Salisbury, Secretary of State for India, on 8 June 1875, 'You and I must look out for the right man.' (See Buckle, *Life of Disraeli, Earl of Beaconsfield*, vol. V, p. 433.) He, however, without consulting Salisbury or the Queen offered the post successively to Lord Powis and to Lord John Manners, both of whom declined (ibid., pp. 435-6.) Finally Disraeli appointed Lytton with the entire approval of Salisbury. (ibid., p. 437.)

[2] op. cit., vol. II, p. 62.

[3] Morley wrote to Minto: 'Haldane [to whom Kitchener expressed his firm expectation] told him that the decision would be mine, and that whatever my decision might be, the Prime Minister would back it, though, by the way, I hear that the Prime Minister personally would be much better pleased if the lot fell upon Kitchener.' (Letter dated 29 April 1910.—Vide Countess of Minto, *India, Minto and Morley*, pp. 400-1.) Writing again on 25 June after the announcement of Hardinge's appointment, Morley alluded to the 'tremendous pressure brought to bear on me on his behalf'. (ibid., p. 405.)

[4] Keith, *The King and the Imperial Crown*, p. 423. This objection, it is submitted, would have been too weak for the king to raise. Even so, given a strong Prime Minister, the King will yield in the end. Professor Keith himself admits that George V 'doubtless acted with wisdom in accepting it'. ibid., p. 423.

offer direct from the Regent (George IV), of whom he was a personal friend, without any previous consultation with the Prime Minister, Lord Liverpool '.[1] This is obviously unthinkable today. Queen Victoria did occasionally offer suggestions. On Lord Northbrook's resignation she suggested the names of Dufferin and Derby to Disraeli, but the latter chose Lord Lytton.[2] The name of Lansdowne was originally suggested to Lord Salisbury by the Queen.[3] It is believed that Mr MacDonald's nomination of a successor to Lord Irwin was disapproved of by King George V, and Lord Willingdon was appointed at his instance. This rather unusual happening is probably explained by the fact that Mr MacDonald was not credited with having shown any firmness in his dealings with the King.

It may be stated here that the name is always formally submitted to the King by the Prime Minister[4] and not by the Secretary of State for India, although the latter invariably signs the Warrant (now Commission) of Appointment. ' The Viceroy is nominated by the Prime Minister, not by the Secretary of State.'[5]

The Viceroyalty of India is undoubtedly a valuable party patronage in the gift of the Prime Minister. It is not correct to say that the Viceroyalty is now conferred ' upon the person believed to possess the highest qualifications for the office '.[6] No Prime Minister, in making the appointment, normally goes beyond the ring-fence of his own party ;[7] and

[1] Curzon, op. cit., vol. II, p. 87.

[2] Buckle, *Life of Disraeli*, vol. V, p. 437.

[3] Lord Newton, *Life of Lord Lansdowne*, p. 49; letter from Salisbury to Lansdowne, dated 31 March 1887. The Queen asked Disraeli whom he thought of nominating for the office of Viceroy as successor to Lawrence. The Prime Minister brought forward, among others, Mayo's name, and Her Majesty expressed herself very graciously about the way Mayo had conducted Irish affairs. A few months afterwards Mayo was appointed. Vide Hunter, *Life of Earl of Mayo*, vol. I, pp. 90-1.

[4] cf. Lord Baldwin quoted above : ' When it became my duty to submit a name to His Majesty for the Viceroyalty of India . . .'

[5] Winston Churchill, *Life of Lord Randolph Churchill*, vol. I, p. 512, Salisbury's letter to Churchill, 15 August 1885.

[6] Curzon, op. cit., vol. II, p. 95. The choice of a Viceroy is certainly ' a most anxious and grave responsibility ', especially in modern times.

[7] During the Committee stage of the Bill of 1935, there was an interesting discussion on Clause 3—appointment of Governor-General. The over-cautious Conservative, Sir Robert Horne, wanted, in effect, to bar the remote contingency

for various reasons the person chosen may not always be the best man available within the party.

It is interesting to see how Dominion Governors-General are appointed. There are three periods in the history of these appointments. In the first period, appointments were made by the British Government regardless of the wishes of the Colonies. In the 'eighties of the last century, protests, often vehement, came from some of them. Eventually the right of prior consultation was conceded. During this second period the initiative was taken in England; the Prime Minister of the United Kingdom formally submitted the names to the Crown. But, by convention, previous approval of the Dominion Prime Ministers had to be obtained. Thus the Dominions secured an effective voice in the choice of their Governors-General. The third stage has been reached as a result of the deliberations of the Imperial Conference of 1930. The Governor-General of a Dominion is now appointed on the formal and exclusive recommendation of the Dominion Prime Minister who also signs the Commission in place of the Secretary of State as heretofore. Moreover, nationals of the Dominions also are now appointed to the office.

It is evident, therefore, that in regard to the appointment of its Governor-General, India is still in the first stage of this evolutionary process. It is no doubt true that, on the whole, the British Government have wisely refrained from appointing any person against whom there was any likelihood of positive prejudice in India. Nevertheless, in view of the constitutional changes which are contemplated, it is desirable that the Federal Prime Minister should be consulted. Various objections were raised by the British Government when the question was first mooted in the Dominions, and similar objections might be raised with regard to India. But, as with

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of the appointment of a Socialist pro-Indian Viceroy by a future Labour Government. Sir Samuel Hoare pointed out the practical difficulties, but said that Sir Robert's object might be better attained by a convention that before the Prime Minister submitted the name he should consult the ex-Prime Ministers and the Leader of the Opposition. There is no reason to believe that this procedure was followed in respect of Lord Linlithgow's appointment. It is extremely doubtful that it will be observed in the future. Vide *H.C.D.*, vol. CCLXVIII, cols. 197 ff.

the Dominions, there appears no reason why any of these objections should be insuperable. Much will, of course, depend upon the strength and persistency of the Federal Government of the future.

On the question of the tenure of the Governor-General, both the Government of India Act[1] and the Government of India Act of 1935 are silent. A long-standing convention makes the office tenable normally for five years. This usage goes back to the Regulating Act of 1773 which fixed Hastings' tenure at five years.[2] And although there was nothing in that or any subsequent Act about the term of office of his successors, the usual period of office of a Governor-General has since been held to be five years. Legally, the appointment was formerly 'during the will and pleasure' of the East India Company, and since its abolition, has been 'during the pleasure' of the Crown. Some of the Governors-General held office for a longer period than five years. Thus Hastings ruled for over ten years as Governor-General, Cornwallis and Wellesley for more than seven years each, and Lords Hastings and Dalhousie for over nine and eight years respectively. On the other hand, some incumbents of the office had much shorter tenure. Ellenborough was Governor-General for only two years and four months, Lord Hardinge for three years and a half and Northbrook for a little less than four years.

It is worth noticing that, since the transfer to the Crown, there has not been a single instance of long tenure like that of Warren Hastings, the Marquess of Hastings or Lord Dalhousie. Among the Viceroys, only Lord Curzon and Lord Hardinge of Penshurst held office for over five years, the former being Viceroy for six years and a quarter and the latter for a little over five years and four months. Further, since the passing

[1] The Government of India Act, 1915, consolidated all the extant Acts of Parliament relating to the administration of British India. This Act was slightly amended by an Act of 1916. The Government of India Act, 1919, was enacted in order to introduce the constitutional reforms envisaged in the Montagu-Chelmsford Report (1918). By sec. 45 of this Act the amendments made by it and by the Act of 1916 were incorporated in the text of the Government of India Act, 1915. This latter Act, with those and subsequent amendments, is technically known as the Government of India Act. It has now been repealed by the Government of India Act, 1935.

[2] His term was, however, extended by successive Acts of Parliament.

of the Leave of Absence Act, 1924, the effective period has been shortened in practice by nearly four months.[1]

Usually the period of office of a Governor-General terminates immediately on the assumption of office by his successor. It may also end by death, resignation or recall. Cornwallis, Elgin I and Mayo died in office; Northbrook and Curzon resigned; Ellenborough and Lytton were recalled. The Act of 1773 provided that Warren Hastings could not be removed from office till the expiry of five years, except by His Majesty upon representation made by the Court of Directors. The right of dismissal of his successors was, however, vested in the Directors.[2] The Act of 1784 empowered the King 'to remove or recall the present or any future Governor-General' and to vacate any appointment made to the office.[3]

The Government of India Act or the Government of India Act, 1935, does not in terms provide for recall. The office being, however, tenable 'during pleasure', the Crown may terminate the appointment of any Governor-General at will.[4]

Under the Act of 1784 a vacancy in the office of Governor-General, in the absence on the spot of a successor, was to be supplied by the Member of Council next in rank to the Commander-in-Chief. He was to hold office until some other person was appointed by the Court of Directors.[5] Under the Indian Councils Act, 1861, however, such vacancy was to be filled by the senior of the two Presidency Governors.[6] The Government of India Act incorporated this provision. Thus Section 90 provided that if there was a vacancy in the office of Governor-General and there was no successor in India, the senior Presidency Governor would hold the office until

[1] Lord Reading and Lord Irwin were on leave for four months each, Lord Willingdon for three months and Lord Linlithgow for four months.

[2] Sec. 10.

[3] Sec. 22. Of course, the Court of Directors' right of dismissal remained unaffected.

[4] A Dominion Governor-General also holds office 'during pleasure' which, by convention, means five years. His appointment is, therefore, terminable at will.

[5] Sec. 24.

[6] Sec. 50.

a duly appointed successor took charge. Pending his assumption of office, the Vice-President, or in his absence, the senior member of the Executive Council (other than the Commander-in-Chief), would officiate.

When, however, leave was granted to the Governor-General and a temporary vacancy thus occurred, an acting Governor-General had to be appointed by His Majesty by Warrant under the Royal Sign Manual.[1] In this case, therefore, a Presidency Governor did not automatically come to office. And there was no obligation on the Crown to appoint him. In fact, however, the three temporary leave-vacancies that occurred since 1924 were filled by appointing the senior Presidency Governors.[2]

The temporary holder of the office of Governor-General had all the rights, powers, dignities and emoluments appertaining to the office.[3]

The Government of India Act, 1935, makes no provision in respect of temporary vacancy in the office of Governor-General. Sec. 304 simply provides that a person appointed by His Majesty to act as Governor-General shall have all the powers and immunities of the Governor-General. It contemplates the contingency of a temporary vacancy due to the Governor-General being absent from India or for any reason being unable to perform his duties. But no provision is made, as under the old Act, for some other person automatically to fill the vacancy.[4] Thus in the event of the sudden death of a Governor-General, there will be none to take his place immediately. A person who is in India cannot forthwith be appointed by telegram, as the appointment must be made by Commission under the Royal Sign Manual.

This omission was, however, intentional. A Dormant

[1] Sec. 87 (1) of the Government of India Act. It will be seen that a leave-vacancy required the same formality as a permanent one. On the contrary, when a vacancy occurred otherwise, e.g. by death, the senior Presidency Governor came to office automatically.

[2] Lord Lytton, Lord Goschen and Sir George Stanley acted during the absence, on leave, of Lord Reading, Lord Irwin and Lord Willingdon respectively.

[3] Sec. 90 (2).

[4] The relevant provisions of the old Act are reproduced in the 9th schedule, (Sec. 90), of the new Act, and will be in force until the establishment of the Federation. See Sec. 317 of the Act of 1935.

Commission under the prerogative power will be issued to one of the Provincial Governors appointing him as Governor-General in case of a vacancy in the office without any successor present on the spot. This will be done immediately on the inauguration of the Federation when the transitional provisions of the Act will cease to operate.

The Act of 1793 laid down that the departure from India of any Governor-General (and certain other high officials) with intent to return to Europe, should be deemed in law a resignation.[1] Consequently, it was not possible for any of these high officials to come home without resigning his office. After a few abortive attempts an Act was passed in 1924 empowering the Secretary of State in Council to grant the Governor-General[2] leave of absence for urgent reasons of public interest, or of health, or of private affairs. Under it a maximum of four months' leave once during the Governor-General's term of office could be granted. Such leave might, however, be extended.[3]

The Act of 1935 is silent on this point. Provision is, however, made by the Letters Patent[4] constituting the office of Governor-General. Clause 4 practically reproduces the old provision. It authorizes the Secretary of State to grant to the Governor-General once during his term of office, for a period not exceeding four months, leave of absence from India for urgent reasons of public interest, of health, or of private affairs. The Secretary of State can extend such leave, 'in which case he shall set forth the reasons for the extension in a minute to be signed by himself and laid before both Houses of Parliament'.[5]

During the Company's régime the Governor-General for India used to be appointed by a Commission of the Company

[1] Sec. 37.

[2] And a few other high officials.

[3] See Sec. 86 of the Government of India Act.

[4] This is the method adopted in the Dominions. So long as there was statutory bar, leave could not be granted by prerogative action. The Leave of Absence Act, 1924, removed that bar. In the absence of such statutory prohibition it is now possible to act under the prerogative. In July 1938 Lord Linlithgow was given four months' leave for reasons of private affairs under this clause.

[5] See Appendix A.

issued on its behalf by the Court of Directors.[1] After the assumption of the Government of India by the Crown the appointment was made by Warrant under the Royal Sign Manual.[2] He was to hold office during Her Majesty's 'will and pleasure' subject to such instructions and directions as he might receive from time to time from the Secretary of State. The Warrant[3] appointing Lord Chelmsford is significant as being the only instrument of the kind which was used for delegating the power of pardon. The Reforms of 1919 necessitated certain changes in the wording of Lord Reading's Warrant.[4] There was also issued for the first time a Royal Instrument of Instructions[5] to the Governor-General. He was required by his Warrant to exercise the powers of his office subject to such instructions and directions as might be given from time to time under the 'Royal Sign Manual or under the hand of one of Our Principal Secretaries of State or as may be or may have been so issued to the Governor-General of India for the time being'.[6]

After the passage of the Act of 1935 the Indian procedure has been brought into line with Dominion practice.[7] For the

[1] Usually the Governor-General received separate commissions for his different functions. Thus in April 1805, Cornwallis received three commissions as Governor-General of Bengal, Governor and Commander-in-Chief at Fort William and Commander-in-Chief in the East Indies respectively. Vide *Home Series* (*India Office*) *Miscellaneous*, vol. 24, pp. 341-6.

[2] Countersigned by the Secretary of State for India.

[3] Dated 3 March 1916.

[4] Signed on 14 March 1921.

[5] This was dated 15 March 1921. In fact, however, an Instrument of Instructions had been issued to the Governor-General on 19 November 1918. But its sole purpose was to prescribe the forms of oaths of allegiance and of office (in the same forms as those now attached to the 1937 Instructions) and to require the Governor-General to take these oaths himself and have these administered to certain other persons. It was, therefore, not of the usual type of Instructions.

[6] The power of pardoning offenders delegated to Lord Chelmsford by his Warrant was not mentioned in the Warrants of Lord Reading and his successors under the old Act; it was, however, incorporated in the Instrument of Instructions, 1921. The relevant clause has now been omitted from the 1937 Instructions and has been incorporated in the Letters Patent of 1937. The Letters Patent are certainly a more appropriate instrument for the delegation of power than the Royal Instructions.

[7] In the Dominions three legal instruments are used. These are the Letters Patent, the Royal Instrument of Instructions and the Commission under the Sign Manual. These are all prerogative instruments issued in the executive sphere and are, therefore, amendable by the Crown. The Letters Patent and the Instrument of Instruction are permanent documents in the sense that these are not issued afresh on the appointment of a new Governor-General. On the

first time in its history the office of Governor-General of India was constituted by Letters Patent[1] passed under the Great Seal of the Realm on 5 March 1937. On the same day Letters Patent were passed constituting the office of the Crown Representative. On 8 March 1937 a Commission under the Royal Sign Manual and Signet was passed appointing the Marquess of Linlithgow as Governor-General of India and Crown Representative.[2] A Royal Instrument of Instructions, superseding the existing one, was passed on the same date.[3] This Instrument will be operative until the Federation comes into existence. Thereafter the Governor-General will be guided by an Instrument of Instructions of an extraordinary character. The draft of the proposed Instrument of Instructions will have to be laid before Parliament, and it can then be issued only if an address be presented to the King by both Houses praying that it may be issued.[4] This 'unprecedented concession to control of Parliament' undoubtedly robs the Indian Instrument of Instructions of much of its prerogative character.

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other hand, every Governor-General, on appointment, receives a Commission under the Sign Manual and the Signet. These instruments are convenient but not essential. Their provisions obviously cannot go against the letter of the Constitution Act.

[1] This was not legally necessary. The Letters Patent have been presumably used in deference to Dominion practice and for the sake of some convenience in delegating certain prerogative powers to the Governor-General.

[2] This Commission superseded the Royal Warrant of 10 March 1936, appointing him as Governor-General of India under the old Act.

[3] See *Gazette of India Extraordinary*, 1 April 1937. All these instruments came into force on 1 April 1937.

[4] Government of India Act, 1935, Sec. 13.

2

THE SOCIAL AND LEGAL STATUS OF THE GOVERNOR-GENERAL

THE Viceroy and Governor-General of India occupies the most picturesque and distinguished office in the overseas service of the Crown. 'The Viceroy is surrounded by pomp and awe; ceremony walks behind and before him, and does obeisance to him.'[1] He is the first citizen in India and is entitled to a salute of thirty-one guns. He is *ex officio* Grand Master of the Order of the Star of India and Grand Master of the Order of the Indian Empire, and on relinquishing office he becomes a G.C.S.I. and G.C.I.E. He has and performs in India social and charitable functions analogous to those of the King in Great Britain.

The Governor-General maintains a state almost royal in its grandeur. He enjoys a very handsome salary and considerable allowances. Under the Government of India Act he was entitled to such salary (not exceeding Rs. 2,56,000) and such allowances as might be fixed by the Secretary of State in Council.[2] For enabling the Governor-General 'to discharge conveniently and with dignity the duties of his office' the Act of 1935 provides that he shall receive an annual salary of Rs. 2,50,800 and such allowances for expenses of equipment and travelling upon appointment and such allowances during

[1] MacDonald, *The Government of India*, p. 54.

[2] Sec. 85 (1). This is still in force under Sec. 317 (1) of the Act of 1935. The figures for 1937-8 were:

Salary of the Governor-General—Rs. 2,50,800.
Sumptuary Allowance—Rs. 45,000.
Contract Allowance—Rs. 1,60,469.
State Conveyance and Motors—Rs. 51,933.
Private Secretary's Pay and the expenditure controlled by him—Rs. 3,58,975.
Expenditure controlled by the Military Secretary—Rs. 8,47,962 nearly.
Total on account of the Viceroy—Rs. 17,15,139.

Besides, the charges on account of the Band, Bodyguard, Military Secretary and the Personal Staff were borne on the Army Estimates.

his term of office as may be fixed by the King in Council. He will also be entitled to such customs privileges as may be specified by Order in Council.[1]

Apart from the dignity and grandeur of his office the Governor-General has an extraordinarily privileged legal status. Even in 1773, when the Governor-General was not the representative of the Crown but simply an agent of the Company, he received special treatment. For the Regulating Act, which created the Supreme Court with very wide powers, expressly forbade it ' to hear, try or determine any indictment or information ' against the Governor-General for any offence, not being treason or felony, alleged to have been committed in Bengal, Bihar and Orissa. He was also free from arrest or imprisonment in civil proceedings before that Court. He was, however, subject to the jurisdiction of the Court of King's Bench in respect of any offence against the Act, or any crime, misdemeanour or offence against any of His Majesty's subjects or any of the inhabitants of India.[2]

The conflicts between the Supreme Court and the Governor-General's Council resulted in curtailment of the Court's authority. It was enacted[3] that the Governor-General and Council, jointly and severally, were to be wholly exempt from the jurisdiction of the Court for anything done in their public capacity ; their order could also be pleaded by their subordinates in justification of otherwise illegal actions, except in respect of European British subjects.

These provisions were consolidated in the Government of India Act. The Governor-General was exempted from the original jurisdiction of any High Court for anything done by him in his public capacity only, from liability to arrest or imprisonment in any original civil proceeding in a High Court, and from the original criminal jurisdiction of a High Court in respect of offences other than treason or felony.[4] The immunity was, however, incomplete. The Governor-General

[1] Sec. 7.

[2] The Regulating Act, 1773, Secs. 15, 17, 39. This applied to certain other persons as well.

[3] Act of 1781.

[4] Sec. 110 (1). This applied to certain other high officials. See Ghose, *Comparative Administrative Law*, pp. 346-7.

was amenable to the jurisdiction of the High Courts in respect of private acts, subject to the limitation regarding criminal prosecution stated above. Further, the lower courts had full jurisdiction and the High Courts in their appellate capacity were free from any of the limitations set forth above. It is amusing to note that the Governor-General, while immune from the original jurisdiction of a High Court, was subject to the jurisdiction of a *munsif* or a deputy-magistrate. This anomaly is, of course, explained by the circumstances of its origin in 1781 when Parliament's only concern was to free the Governor-General and his Council from the too inconvenient and unwelcome control of the over-active Supreme Court.[1]

The Governor-General could not escape the jurisdiction, civil or criminal, of any competent court in England in respect of illegal acts done or ordered by him in Council. Moreover, under Sec. 127 of the Act, the High Court of England was specifically empowered to try him for any offence under the Act,[2] or any offence against any person within his jurisdiction or subject to his authority.

The Government of India Act, 1935, has very greatly extended the legal immunity of the Governor-General. Under it, ' no proceedings whatsoever shall lie in, and no process whatsoever shall issue from, any court in India against the Governor-General, . . . whether in a personal capacity or otherwise, and, except with the sanction of His Majesty in Council, no proceedings whatsoever shall lie in any court in India against any person who has been the Governor-General . . . in respect of anything done or omitted to be done [by him] during his term of office in performance or purported

[1] Since the passing of the Act of 1781 it appears that no advantage was taken of this loop-hole in the law. This, therefore, explains the existence of the anomaly. In 1924 the Muddiman Committee remarked that the immunity as it stood was of little value. They recommended that if it was to be maintained, it should be complete and the jurisdiction of all courts should be barred in respect of the matters in which the High Courts had no jurisdiction. See *Report of the Reforms Inquiry Committee*, 1924, p. 76.

[2] These offences were :

(1) Oppression of any British Subject.
(2) Wilful breach or neglect of the Secretary of State's orders.
(3) Wilful breach of the trust and duty of office.
(4) Trading otherwise than as a shareholder.
(5) Taking of presents. Vide Sec. 124.

performance of the duties thereof'.[1] The immunity is very wide indeed. During his term of office the Governor-General is wholly beyond the reach of all courts in India.[2] Public as well as private actions of the Governor-General are thus clearly protected ; so that there is no legal remedy whatever in India against a Governor-General even in respect of such matters as private debts or assault.[3] Even when he ceases to be Governor-General, no proceedings can be brought against him in any Indian court in respect of anything done by him while in office, in performance or purported performance of the duties thereof, except with the sanction of His Majesty in Council. Under the clause as originally passed by the House of Commons, it would have been possible to bring an action against the Governor-General after he had ceased to hold office, without such sanction. This provision was altered by the House of Lords on an official amendment moved by Lord Hailsham. The Lord Chancellor observed that the need for sanction of the King in Council would give sufficient protection to a former Governor-General and at the same time provide for an extreme case in which it might be desirable to remove the immunity granted.[4] The wording of the clause clearly shows that the sanction of the King in Council is required only in respect of anything done in performance or purported performance of the duties of office. But in respect of his private actions while in office, an ex-Governor-General may be sued, both civilly and criminally, in an Indian court without such sanction.

In India, therefore, the legal immunity of the Governor-General is practically complete. His legal position is incomparably better than that of the Governor-General of a Dominion, who is liable in the courts of the territory under his charge, both civilly and criminally, for anything done in his personal or public capacity. In England, however, he remains liable to proceedings to the same extent as Governors

[1] Sec. 306 (1). It came into force on 1 April 1937. The Crown Representative is given the same protection. See Sec. 306 (2).

[2] As no process also can issue from any court the Governor-General cannot be made to appear, for instance, as a witness.

[3] cf. Keith, *A Constitutional History of India*, p. 351 ; *Jour. Comp. Leg.*, November 1935, p. 278. The Governor-General cannot be sued even with his own consent.

[4] *H.L.D.*, vol. XCVIII, cols. 11-12.

elsewhere.[1] He can, therefore, be sued in contract or in tort for a cause of action arising while he was in India. He may also be tried in the United Kingdom for crimes or misdemeanours or murders committed in India.

In addition to this legal immunity the Governor-General is immune from criticism in the Indian Legislature. Standing Orders[2] of both Chambers of the Indian Legislature as well as of the different provincial legislatures definitely prohibit discussion of the conduct of the Governor-General as distinct from the Governor-General in Council. Conduct is interpreted not in the sense of private or moral conduct only, but includes the exercise by him of any of his personal powers, whether statutory, delegated or otherwise—powers exercisable in law by the Governor-General apart from his Executive Council. As the President of the Assembly has definitely ruled on several occasions, the prohibition means that 'any action taken by the Governor-General apart from the Government of which he is the head . . . is outside the scope of debate'[3] in the Legislature. No matter how arbitrarily the Governor-General may, in the opinion of the legislators, use his immense powers, his actions cannot be directly attacked on the floor of the House.[4]

The position in the Dominions, however, is quite different. Thus in Canada[5] no member may speak disrespectfully of the Governor-General ; in South Africa[6] no member may use the Governor-General's name irreverently in debates or for the

[1] On the liability of a Dominion Governor-General, vide Keith, *The Constitutional Law of the British Dominions*, p. 142.

[2] cf. Standing Order No. 29 (1) (IV) of the Legislative Assembly : 'A Member while speaking shall not . . . reflect upon the conduct of His Majesty the King or the Governor-General (as distinct from the Governments of which they are respectively the heads . . .).'

[3] *Legislative Assembly Debates*, 1925, vol. V, p. 2497 ; 1936, vol. I, p. 467.

[4] Even such a guarded criticism as the following is out of order. On 4 July 1923, Dr Nand Lal, supporting a Resolution recommending amendment of Sec. 67 B, said : 'With the most profound respect for the honest convictions of His Excellency [Lord Reading], I may be permitted to submit that at that juncture it was a political error to resort to certification [of the Salt Tax].' Mr President : 'Order, Order.' See *L.A.D.*, 1923, vol. III, p. 4303. Any question, resolution or motion for adjournment is out of order, if it relates to the use of the powers of the Governor-General as such.

[5] See Standing Order of the House of Commons, No. 41.

[6] Standing Order of the House of Assembly (1924), No. 71 ; Standing Order of the Senate, No. 141 (e).

purpose of influencing the deliberations of the Chamber.[1] So the only privilege that a Dominion Governor-General enjoys is that he must not be referred to in debate disrespectfully or irreverently. The other restriction on the use of his name is not in his interest but is intended to eliminate extraneous influence in the deliberations of the House. He is liable to criticism in the Legislature, and on occasions his conduct has been severely criticized and votes of censure have been passed.[2]

Clearly, therefore, the Governor-General of India occupies a much more privileged position than his compeers in the Dominions. In fact his position in this respect is decidedly better than that of the King himself. Of course, in Parliament irreverent use of the King's name is not permitted ; further, his name cannot be used to influence a debate.[3] And ' unless the discussion is based upon a substantive motion, drawn in proper terms, reflections must not be cast in debate upon the conduct of ' the King.[4] For instance, his conduct cannot be criticized upon a motion for adjournment.[5] Parliament has, however, full and unfettered right to discuss His Majesty's conduct upon a substantive motion. Dunning's famous motion that ' the influence of the Crown has increased, is increasing and ought to be diminished ', is a classic case on this point.[6] In course of the debate on this motion the conduct of the King came in for strong criticism. ' The present influence of the Crown,' one Member said, ' was founded in corruption ; instead of strength it only produced imbecility ; instead of glory, disgrace . . .'[7] The Governor-General of India is, however, wholly beyond the criticism of the Legislature in respect of anything done by him in the exercise of his extraordinarily wide and autocratic powers. A member may, of course, move a Resolution to the effect

[1] There are similar provisions in the other Dominions. cf. Standing Order of the Australian House of Representatives (1921), No. 271 ; Standing Order of the Senate, No. 417.

[2] cf. Keith, *Responsible Government in the Dominions*, 2nd ed. (1928), vol. I, pp. 118ff.

[3] May, *Parliamentary Practice*, 13th ed. (1924), p. 320.

[4] ibid., pp. 323-4.

[5] ibid., p. 271.

[6] See *Parliamentary History*, XXI, p. 367. This motion was passed by the House of Commons in 1780.

[7] ibid., p. 355 : Speech of Mr Martin.

that some power or powers should be taken out of the hands of the Governor-General. But in support of such a motion he cannot make any adverse comment, however guarded, on the actual use made of his power by the Governor-General in some specific case.[1] A substantive motion on the latter subject is also clearly out of order. The King's conduct does not in practice come in for criticism for the quite obvious reason that the King normally acts on the advice of Ministers who are, therefore, answerable to Parliament for all his public actions. In India the Governor-General is not bound to act according to anybody's advice, not even the advice of his Executive Council; this latter body has no responsibility in the matter and cannot be directly criticized for the Governor-General's actions. Thus the immunity of the Governor-General is not covered by the responsibility of others as in the case of the King. Indeed, we have the curious position that, for the exercise of these personal powers of the Governor-General, neither he nor the Executive Council can be directly criticized in the Legislatures.

Again, the legal immunity of the King is perfectly understandable inasmuch as it is covered by the legal responsibility of his Ministers for his public acts. But there is no such justification in the case of the Governor-General, for his legal immunity has no counterpart in the legal liability of any other authority.

The whole position is anomalous. The Governor-General of a Dominion ought now to be immune from Parliamentary criticism and from legal responsibility in respect of his public actions, because he occupies the position of a constitutional monarch today. The legal immunity of the Governor-General of India is presumably based upon the analogy of the King, which for the reasons stated above is totally inapplicable. In theory, at any rate, the grant of such wide legal immunity is indefensible. And, what is of greater importance, the actions of the Governor-General, in so far as these are independent of his Executive Council, or of the Ministers under the new Act, should be subject to criticism in

[1] See the ruling of the President of the Legislative Assembly on Dr Nand Lal's remarks, p. 21 n. 4.

the Legislature as fully as the actions of Executive Councillors or Ministers, as the case may be, with this limitation that he should not be referred to disrespectfully. We may refer in this connexion to an interesting discussion in the Assembly on the question of the advisability of amending the Standing Orders so as to permit criticism of the official actions of the Governor-General. It was argued that, under the constitution as it was, where extraordinary powers were vested in the Governor-General personally, his actions ought to be beyond criticism on the floor of the Legislature. Or, as Mr (now Sir) James Crerar (Home Member) put it, 'it is the intention of the Act that the Governor-General, in the exercise of those powers, should have the most complete discretion, that his liberty of action and his responsibility should be comprised in the responsibility which he ultimately owes to the Crown'.[1] The obvious reply to this argument is that the possession of admittedly large personal or discretionary powers by the Governor-General provides the stronger reason for making him amenable to criticism in the Legislature in respect of the manner of the exercise of these powers. There is, in fact, no incompatibility between the ultimate responsibility of the Governor-General to the Crown and his subjection to criticism in the Legislature. For criticism is certainly not control, and even the strongest criticism there does not in any way limit his ultimate power. If Sir James Crerar's argument be accepted, it logically follows that as the Governor-General in Council is also legally responsible to the Crown, the actions of Executive Councillors should also be immune from such criticism. On this view also, then, the exemption cannot be justified. Sir James further contended that the immunity was justified on the principle that the person criticized should have an effective opportunity to reply.[2] The Governor-General was obviously not in a position to answer the criticisms made on the floor of the Legislature; the members of the Executive Council having no share in those powers[3] and no right even to advise the

[1] *L.A.D.*, 1929, I, p. 791.

[2] On the other hand, it stands to reason that the person exercising powers should be prepared to face criticism. The King is not criticized because he does not act independently.

[3] i.e. the Governor-General's personal powers, for which see Chap. 3.

Governor-General in the exercise of those powers, should not be made to defend his actions on the floor of the House.[1] This argument also is unconvincing. For the members of the Executive Council are in reality not mere ciphers in respect of the exercise of these personal powers of the Governor-General.[2] Moreover, the Governor-General has the right of overruling his Council, and even when so overruled, members of the Executive Council are obliged to defend the decision of the Governor-General. There is, therefore, no reason why they should be unable to do so, when the Governor-General acts in respect of his personal powers. It is desirable that when new rules are framed for the conduct of legislative business under the new Act, there should be provision for criticism in the Legislature of the public actions of the Governor-General in so far as he acts on other than ministerial advice. It is unreasonable that, while his actions may be criticized in the press and on the platform, the duly elected representatives of the people should be unable to comment on his actions in the most appropriate forum.[3]

The conduct of the Governor-General cannot be reflected upon in Parliament except on a substantive motion, drawn in proper terms.[4] Thus his conduct cannot be criticized by way of amendment or upon a motion for adjournment. The position of Parliament is, therefore, different ; it may severely attack his conduct if a formal motion is tabled. This course is, however, prohibited to the Indian Legislature.

[1] See *L.A.D.*, 1929, vol. I, p. 791.

[2] See pp. 111-14.

[3] There is nothing in the old or in the new Act to show that it is the intention of Parliament to prohibit such criticism. The Standing Order, as interpreted, is, it is submitted, without any precedent in either England or in the Dominions, and is against the spirit of the constitution.

[4] May, op. cit., p. 323.

3

THE POWERS OF THE GOVERNOR-GENERAL

In the present chapter it is proposed to make a survey of the powers which the Viceroy and Governor-General had under what was popularly known as the Montagu-Chelmsford Reforms. The statutory basis of these powers was the Government of India Act, that is, the Government of India Act, 1915, as modified and amended by subsequent Acts. This Act has now been repealed by the Government of India Act, 1935, which partially came into effect on 1 April 1937. But by Sec. 317 (1) of this latter Act some of the provisions of the old Act (in fact, most of its provisions relating to the Central Government) are, with minor amendments, to remain in force until the establishment of the Federation of India. Accordingly, we shall, in the following pages, deal primarily with the powers of the Governor-General under the Montagu-Chelmsford Reforms, indicating at the same time the position during the transitional period.

The powers of the Governor-General are divisible into two categories—(1) personal powers, that is, powers belonging to him in his individual capacity as Governor-General; and (2) powers in Council, that is, powers shared by him with his Executive Council. These powers again are either statutory or non-statutory. The bulk of the statutory powers were consolidated in the Government of India Act. Some of the statutory powers were not directly conferred by the Government of India Act, but were derived from it. The most important of these were the powers given by Rules made under the Act. The rest were bestowed by Acts of the Indian Legislature created by the Government of India Act.

All other powers are non-statutory in character, consisting mostly of prerogative powers of the Crown, delegated to the Governor-General or the Governor-General in Council, either expressly or by implication, and of a few others not traceable to

any delegation from the Crown. These latter were essentially prescriptive powers, exercised over a long period, on the theory of derivation from the Indian predecessors of the Company.

On the question of the extent of the powers of the Governor-General, apart from statute, it has to be remembered that he is not, and never has been, 'a Viceroy in the sense of being a person to whom the whole prerogative of the Crown has been delegated'. 'The Governor-General of India', says Ghose, 'is appointed by His Majesty by warrant under the Royal Sign Manual, which confers on him virtually the whole prerogative of the Crown even as regards dealings with foreign powers. The Governor-General is thus in the position of a Viceroy.'[1] This statement, based on an assertion of Jenkyns,[2] has absolutely no foundation. There is nothing in the Warrant of Appointment to support this view. Strictly speaking, the term 'Viceroy' is a misnomer. The Viceroy is the representative of the King in a purely ceremonial sense. In fact, apart from the social prestige and dignity associated with it, this additional title[3] gives the Governor-General no additional power or immunity. He does not possess, and never did, the full prerogative of the Crown. He has no right to declare war or neutrality, conclude peace, make treaties of any kind, and accredit representatives to foreign countries or receive foreign representatives.

Prior to 1 April 1937,[4] the non-statutory powers of the Governor-General in his personal capacity were :

I. Delegated :
   (1) Power of pardon.
   (2) Power to suspend persons appointed by the Crown in India.
   (3) Holding of Investitures.
   (4) Recommending persons for Acting Governorships.

[1] Ghose, *Comparative Administrative Law*, p. 346.

[2] Sir Henry Jenkyns stated that a Governor's Commission 'may confer on the Governor, as it has in India, the whole prerogative of the Crown, even as regards dealings with foreign affairs'. It is surprising how Jenkyns could draw this inference from the Warrant of Appointment of the Governor-General of India. See his *British Rule and Jurisdiction Beyond the Seas*, p. 103.

[3] cf. 'It is a term of courtesy and not of law.' Mr Butler in the House of Commons, 19 February 1935. *H.C.D.*, vol. CCXCVII, col. 257.

[4] For the present position, see Chap. 15.

II. Non-delegated :
(1) Grant of Indian Honours.
(2) Patronage—certain appointments.

Similarly, the non-statutory powers of the Governor-General in Council were :

I. Delegated :
Power of making treaties and arrangements with Asiatic States.[1]

II. Non-delegated :
(1) Exercise of power of Paramountcy.
(2) Grant of Viceroy's Commissions in the Indian Army to Indian officers.

We now proceed to consider the powers of the Governor-General, irrespective of their sources; powers, that is, vesting in him, in person or in Council, either by law or by practice. These may be conveniently studied under three heads—administrative, financial and legislative.

The Governor-General : Administrative Powers

Honours

Honours and titles are of two kinds : British honours, such as Knighthood or Companionship of the Indian Empire, and purely Indian honours, such as the title of Raja or Nawab. The British honours are conferred by and in the name of His Majesty the King. The well-established practice in this matter is for the Viceroy to send his recommendations to the Secretary of State for India who formally submits the names to the King. Recommendations for Knighthoods are, however, formally included in the Prime Minister's list. The Private Secretary, on behalf of the Viceroy, writes to the Governors of Provinces, the heads of Minor Administrations and the Members of the Executive Council for nominations for honours in their respective spheres. The Viceroy himself suggests the honours for his colleagues and the heads of Provinces. The list as finally prepared is then forwarded to the Secretary of State by the Viceroy in a private communication.

[1] Ilbert, *The Government of India*, 3rd ed. (1915), p. 203.

Constitutionally the Secretary of State is not bound to submit to His Majesty the names suggested by the Viceroy. But in practice such recommendations are normally accepted, and never flatly turned down.

The same procedure, *mutatis mutandis*, is followed in respect of Indian titles. But here the Viceroy is the final authority. In this respect the Viceroy of India stands unique, because none of the other Governors-General has the power of granting titles. The origin of this power is obscure. The facts appear to be as follows. Titles used to be conferred by the Indian predecessors of the Company. Many of these titles were subsequently confirmed by the Company.[1] Gradually the Company's Government itself began to confer these Indian titles.[2]

The whole subject was reviewed after the Mutiny. Thereafter, it appears that titles began to be conferred by the Viceroy and Governor-General in his own name, and since then the practice has continued. This power of conferring titles does not pass to the Governor of a Dominion or Colony by implication. So the source of this authority in the case of the Viceroy of India cannot be traced to the Royal prerogative, because no formal delegation was ever made. It must be traced through the Governor-General in Council and the East India Company, to the Indian Rulers who preceded the Company.[3]

The Viceroy has also the power of divesting people of the titles or decorations conferred by him.

The Holding of Investitures

The Viceroy normally holds investitures for the conferment of decorations and titles granted by the King upon people who

[1] For instance, the title of ' Maharaja Bahadur ' was first recognized by the Company in respect of the family of Maharaja Bhoop Sing of Patna as early as 1770, and was later bestowed on him on succession in February 1829. See *India Office Tract*, No. 823.

[2] cf. Lee-Warner, *The Native States of India*, p. 319.

[3] The position has recently been regularized. In May 1937, the King formally authorized the Viceroy to grant such Indian Honours as had hitherto been the practice for the Viceroy to grant. Hence it is more accurate to say that the grant of Indian honours is now by virtue of delegation. If the Viceroy now wants to grant a new title he has to get fresh authority from the King. For reasons, see p. 254.

cannot receive them from His Majesty in person. In the case of the Indian Orders, such as the Star of India, the Statute of the Order itself authorizes the Viceroy to hold the investiture. In respect of the British Orders, such as a K.C.B., the Viceroy receives from the King in each case an authority countersigned by the Home Secretary to invest the recipient on His Majesty's behalf.

Precedence and Salutes

Precedence in India is prescribed by the King under the prerogative. But the relative rank of the Indian Princes is decided by the Viceroy, whose decision is authoritative. The table of salutes in respect of Indian Princes is laid down by His Majesty. The Viceroy can amend the table of salutes, subject to the approval of the King.[1]

The Governor-General and Appointments

A large number of important appointments rested, and still rest, with the Governor-General. The patronage of the Governor-General falls into two categories : (1) appointments in respect of which the legal power is vested in him, and (2) appointments which are, by convention, in his gift. To take category (1) first :

Formerly, the Governors of Bengal, Bombay and Madras were appointed by His Majesty, that is, by the Secretary of State, from among British politicians. Ordinarily, the Governor-General was not consulted; at any rate he did not take the initiative in regard to these appointments. The Governors of the other Provinces, however, were appointed by His Majesty ' after consultation with the Governor-General '.[2] In theory, the Governor-General simply recommended and the Secretary of State was not bound to accept his recommendations. Under the unwritten law, however, the Governor-General always took the initiative in this matter and his nominees were almost invariably appointed.[3] In practice

[1] Lee-Warner, *The Native States of India*, p. 320.

[2] Sec. 46 (2) of the Government of India Act.

[3] All Governors are now, in law, appointed by the Crown and no prior consultation with the Governor-General is required. (See Sec. 48 of the Act of 1935.) The practice, however, remains as before.

these Governorships were the monopoly of the Indian Civil Service. In regard to the appointment of the late Lord Sinha it may be presumed that the initiative lay with Mr Montagu, the Secretary of State. This was, however, an exceptional case involving a radical, and the only, departure from the established tradition.[1]

In 1924 an Act was passed authorizing grant of leave of absence to the Governor-General, Governors, etc. In that year the Instrument of Instructions to the Governor-General was amended by the insertion of a new clause :

'And We do hereby authorize and direct Our Governor-General, whenever his Government recommends the grant of leave of absence to any Governor of one of Our Presidencies or Provinces in India, to submit to Our Secretary of State his recommendation as to the person to be appointed as Governor during such absence.'

It will be seen, therefore, that leave-vacancies in respect of all Governorships were filled on the Governor-General's recommendation.[2]

The Governor-General appointed, and still appoints, the President of the Council of State and a panel of chairmen to preside at its meetings in the absence of the President. He chooses the nominated members, official and non-official, of the Council of State and the Legislative Assembly. The officers of the Legislative Assembly are appointed by the Governor-General after consultation with the President of the Assembly.

Under category (2) there are two kinds of appointments : those vesting in the Crown and those vesting in the Governor-General in Council.

In law, the members of the Governor-General's Executive Council were, and continue to be, appointed by the King, that is, on the advice of the Secretary of State.[3] In practice,

[1] The Governor-General had the power of appointing a Deputy-Governor to administer part of a Governor's Province. This power, however, remained unused.

[2] The Governor-General, with the approval of the King, had the power of appointing the Lieutenant-Governor of a Province and the members, if any, of a Lieutenant-Governor's Executive Council. There was, however, no Province under a Lieutenant-Governor after 1923.

[3] Sec. 36 (1) of the Government of India Act, continued in force by Sec. 317 (1) of the Act of 1935.

however, they are almost invariably the nominees of the Governor-General. In respect of all other Indian appointments, which were or are made by or with the approval of the King or by the Secretary of State, with the exception of that of the Commander-in-Chief, the recommendation of the Governor-General is invariably taken and normally accepted. For instance, under the old Act, the power of appointing the members of the Public Service Commission was legally vested in the Secretary of State in Council. In practice, however, it was the recommendation of the Governor-General which was accepted.[1] The two members of the Judicial Committee with Indian experience were, and are, presumably appointed after consultation with, and the consent of, the Governor-General. The three Indian members of the India Council and the others who were retired service-men from India were also appointed after similar consultation.[2] The names of persons for appointment as Judges of the High Courts and as members of the Executive Council in Governors' Provinces were transmitted to the Secretary of State by the Governor-General. In these appointments the decisive part was, however, played by the Governor.[3]

The Government of India Act specifically conferred upon the Governor-General in Council the power of making certain appointments. Thus temporary members of the Executive Council (except the Commander-in-Chief),[4] additional Judges of all High Courts,[5] the officiating Chief Justice or Puisne

[1] See Government of India Act, Sec. 96 C. At present the members of the Federal Public Service Commission are appointed by the Governor-General in his discretion. See Government of India Act, 1935, Sec. 265 (1).

[2] This remark is now applicable to the Secretary of States' Advisers under the Act of 1935, Sec. 314 (3).

[3] In reply to a question in the Assembly, Mr O'Donnell, Home Secretary, stated : 'Permanent appointments of High Court Judges in Madras are made by His Majesty and recommendations regarding such appointments are made to the Secretary of State direct by the Government of Madras.' (Vide *Legislative Assembly Debates*, 1921, vol. I, part i, p. 581.) This would equally apply to Bombay. It is doubtful if this was the invariable practice in those days. In recent times, however, this has not been the normal procedure. The Governor-General always sends the recommendation regarding these appointments to the Secretary of State, after ascertaining the opinion of the Governor and normally also of the Chief Justice. Some Secretaries of State have been known to have informally consulted the Governors.

[4] Sec. 92 (1).

[5] Sec. 101 (2) (i).

Judges of the Calcutta High Court[1] and the officiating Advocate-General of Bengal[2] were to be appointed by the Governor-General in Council. The High Commissioner for India was also appointed by the same authority with the approval of the Secretary of State in Council.[3] Certain Acts of the Indian Legislature also provided for the appointment to certain offices by the Governor-General in Council. For instance, the Reserve Bank Act, 1934, laid down that the Governor and Deputy-Governors of the Bank were to be appointed by the Governor-General in Council.[4]

In practice, however, the Executive Council as a body had nothing to do with these appointments. The Governor-General himself chose, and still chooses, the temporary members of his Council. The Judges were, and still are, appointed by the Governor-General on the recommendation of the Governor and the Chief Justice of the Province. The Advocate-General was appointed by him on the recommendation of the Governor of Bengal. The Reserve Bank appointments were made by him in consultation with the Finance Member. The name of the High Commissioner, however, seems to have been discussed in Council.

Besides, there are a large number of posts which have always been filled by the Governor-General, although the power of appointment belongs to the Governor-General in Council without, however, any express specification as above. In fact, most of the higher appointments under the Government of India fall in this category. And, by long-standing usage, the highest appointments under the Government of India which are made in the name of the Governor-General in Council are the special patronage of the Governor-General. 'There is a large sphere of action', says Curzon, 'which by convention, as distinct from statute, is regarded as the peculiar province of the head of the Government, and in which his colleagues

[1] Sec. 105.
[2] Sec. 114 (3).
[3] Order-in-Council, 13 August 1920.
[4] At present, in law, all temporary and additional Judges of High Courts and the Governor and the Deputy-Governors of the Reserve Bank are appointed by the Governor-General in his discretion, the High Commissioner by the Governor-General in Council and the Advocate-General of Bengal by its Governor in his individual judgement.

make little or no attempt to dispute, or even to share, his prerogative."[1]

Thus all officers in the Secretariat of the Government of India, from the Under-Secretary to the Secretary, are appointed by the Governor-General. The appointments legally vest in the Governor-General in Council, but the age-long practice has been for the Department concerned to make its recommendation to the Governor-General as to the person or persons suitable for the vacancy. Any given appointment is certainly made after consultation with the Member in charge, especially where the appointment of a Secretary is concerned. The Member or the Secretary of the Department is likely to have considerable influence in the matter; for, in the first place, the Governor-General cannot usually be expected to know the suitability of the possible choices as much as the Member or the Secretary; and, in the second place, as the Member is immediately responsible for the efficiency of his Department, his wishes will carry great weight with the Governor-General. Such appointments are invariably a matter between the Governor-General and the Member and are not discussed in Council, unless some general principle has to be laid down. In respect to his own Departments the Governor-General's discretion is complete, except to the extent that he consults, and is mainly guided by the advice of, the Secretary concerned. Like appointments, confirmations, where necessary in practice, and extensions of the period of service of Secretariat officers require the approval of the Governor-General. The Viceroy appoints at his sole discretion his entire personal staff. He chooses his own Private Secretary, Assistant Private Secretaries, Military Secretary, Comptroller of the Viceregal Household, the Surgeon, and the A.D.C.s. The lesser appointments, though entirely in his hands, he normally leaves to the Private and Military Secretaries.[2] The Governor-General also appoints the Secretary to the Executive Council. The large number of appointments under the Foreign and Political Department, such as those of Residents in Indian

[1] Curzon, op. cit., vol. II, pp. 109-10.

[2] The Act of 1935 (Sec. 305) now gives the Governor-General the legal power of appointing his own Secretarial Staff.

States and Political Agents, are exclusively in his gift. Among other appointments made by the Governor-General are those of the Chief Commissioners of Minor Provinces and the Heads of all Attached Offices.[1] In truth, all important appointments in the Government of India were, and are, made by, or with the approval of, the Governor-General.[2]

Grant of Commissions in the Indian Army

Before the transfer of the Government of India to the Crown, the Governor-General in Council granted commissions to officers of the army raised by the East India Company. 'The power to grant such commissions', says Ilbert, 'may be presumed to have been derived from the Charters and Acts relating to the East India Company.'[3] The question of the status of officers with the Company's commissions vis-à-vis the officers of the royal forces became a subject of controversy. 'To remove or mitigate the jealousies and friction between the King's officers and the Company's officers', Cornwallis, who was in 1796 appointed both Commander-in-Chief and Governor-General, granted brevet commissions in the King's army to all officers of the Company's army. This device was continued until the abolition of the Company, brevet commissions being granted under powers delegated for that purpose by the Crown to the Commander-in-Chief in India.[4]

[1] The Political Department is now a separate department under the Crown Representative who, however, is in fact the same person as the Governor-General. The Chief Commissioners are now, in law, the appointees of the Governor-General.

[2] Leave was, and still is, granted to the Commander-in-Chief and the Governor of a Province by the Secretary of State on the recommendation of the Governor-General in Council. The Members of the Executive Council are granted leave by the Governor-General in Council. In practice it is the Governor-General who acts and the Council as such is not consulted.

In 1926 a new clause was added to the Governor-General's Instrument of Instructions authorizing and empowering the Governor-General in the name and on behalf of the King 'for sufficient cause to him appearing' and with the concurrence of the Secretary of State 'to suspend from the exercise of his office any person appointed' by the Crown or with its approval 'to an office in India against whom misbehaviour shall have been alleged'. He was further empowered 'to constitute a tribunal to inquire into the truth of such allegations' so that the King's pleasure might be signified on its findings. Thus the Governor-General could, under this delegated authority, suspend persons like Governors, High Court Judges, Members of the Executive Council, and so on. Of course, the Secretary of State's previous approval was necessary.

[3] op. cit., p. 295.

[4] ibid., p. 296.

Sec. 30 of the Government of India Act, 1858, provided that all appointments to offices, commands and employments in India, and all promotions which by law or under regulations, usage or custom were then made by any authority in India, should continue to be made in India by the same authority.

'The existing Army Act', says Ilbert, 'does not confer on the Governor-General of India any power to grant commissions or recognize any such power. . . . He would appear not to have, by virtue of his office, power to grant any military command over officers of the regular forces.'[1] Ilbert concludes :

'It would appear that any forms of appointment, whether described as commissions or otherwise, granted by the Governor-General or by the Governor-General in Council, could not confer the status and powers of command conferred by commissions under the signature of the King. No express power to grant such commissions is conferred on the Governor-General by the existing form of his warrant of appointment.'[2]

In practice, commissions were granted by the Governor-General in Council. These commissions were technically known as Viceroy's commissions. Until 1937 the authority for this had to be sought not in any express delegation, but in usage and practice. These commissions were granted to Indian officers of the Indian Army, such as subahdars. Viceroy's commissioned officers were distinctly inferior in status to the King's commissioned officers and the most senior among them was lower in status than the rawest subaltern. The Viceroy's commissions ran in the name of 'The Viceroy and Governor-General of India in Council' and were given in the name of His Majesty. In practice, the Council had nothing to do with these commissions which were granted by the Governor-General on the recommendation of the Commander-in-Chief.

Certain changes have recently been introduced. Under the Letters Patent of 5 March 1937, constituting the office of Governor-General of India, the Crown has delegated to the Governor-General 'authority and power to grant in Our name or on Our behalf Commissions in Our Naval Forces,

[1] op. cit., pp. 298-9.

[2] ibid., p. 299.

Our Indian Land Forces and Our Indian Air Force'.[1] For the first time, therefore, express delegation of this power has been made. At present the Governor-General grants two kinds of commissions : (1) the old Viceroy's commissions, and (2) King's commissions of the type in use in the Dominions. The Viceroy's commissions are issued in the name of the King by the Viceroy and Governor-General. The King's commissions are issued by the King and witnessed in India by the Governor-General. In other words, these commissions are issued by the Governor-General on behalf of the King. At present there are three classes of officers in India : (1) Viceroy's commissioned officers who are Indian officers in Indian regiments. They have no right of command over British officers or British soldiers. (2) Indian officers with King's commissions. They are attached to Indian regiments and have the right of command over British officers of junior rank in the Indian regiments. (3) British officers in British regiments. The Governor-General can grant commissions to the first two categories of officers only.

The Power of Pardon

During the régime of the East India Company the power of pardoning offenders was exercised by the Government of India, either by virtue of their delegated sovereignty or as direct successors of the Indian sovereigns whom they displaced. Statutory provision on the subject was subsequently made by the Indian Criminal Procedure Code and the Indian Penal Code. Sec. 401 (1) of the Criminal Procedure Code provided :

'When any person has been sentenced to punishment for an offence, the Governor-General in Council or the Local Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.' Sec. 402 (1) laid down : 'The Governor-General in Council or the Local Government may, without the consent of the person sentenced, commute any of the following sentences for any other mentioned after it : death, transportation, penal servitude,

[1] Cl. 3. See Appendix A.

rigorous imprisonment,' simple imprisonment, fine. Further, Sec. 54 of the Indian Penal Code provided : 'In every case in which sentence of death shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced, may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.' And Sec. 55 of the Code laid down that in case of sentence of transportation for life the punishment might be commuted to imprisonment not exceeding 14 years.[1]

Although the power was conferred upon the Governor-General in Council, in practice it was exercised by the Governor-General on the advice of the Home and Law Members, the papers being put up by the Home Member.

It will be seen that the right of remission or commutation spoken of above was a right conferred by statute. The Governor-General of India did not exercise, by delegation, the royal prerogative of mercy.[2] In 1916 it was probably felt that he

[1] In view of Sec. 402 (1) of the Criminal Procedure Code, Sec. 54 of the Indian Penal Code appears to have become redundant. Sec. 55 of the Indian Penal Code seems to indicate that life-transportation may be commuted to imprisonment but not to fine, while death sentence may, under Sec. 54, be commuted to a fine. The result is clearly illogical. While the inconsistency of Sec. 55 of the I.P.C. with Sec. 402 of the Cr.P.C. was removed by the addition of Sub-Sec. (2) to the latter by Act XVIII of 1923, the anomaly just referred to still remains.

[2] Mr A. K. Ghose, in his *Public Administration in India*, p. 108, observes : 'Before the year 1920 [obviously he means 1916], the prerogative impliedly attached to his office as the representative of the Sovereign, apart from the power being reserved to him under the criminal law as head of the executive.' Professor Keith doubts whether the prerogative of pardon would pass to a Governor without delegation. Referring to the case of A.G. for Canada *v.* A.G. of Ontario (23 S.C.R. 458) he says that the Chief Justice of Canada held that ' the delegation is essential if it is to pass '. ' On the other hand', says Keith, 'it is so essential an element of government that it might be deemed to be included in the duties delegated to a Governor by the instruction to perform the duties of a Governor.' Keith, *Responsible Government in the Dominions*, 1st ed. (1912), vol. III, p. 1386. The more correct view seems to be that it does not pass without express delegation. This is confirmed by the fact that in all Dominions this power has been expressly delegated. This view is further confirmed by the circumstance that the power of the Governor-General is not co-extensive with that of the King in this regard. The King may pardon an accused person both before and after conviction. But under the terms of delegation the Governor-General can exercise it only in respect of a person convicted of an offence. In South Africa the grant of a pardon to an accused whose case was still pending was regarded as invalid. (See Kennedy and Schlosberg, *The Law and Custom of the South African Constitution*, pp. 126-7.) If the power passed without delegation, then this decision would be unsound. It is submitted, therefore, that Mr Ghose's view is untenable. Moreover, under the criminal law this power was not reserved to him as head of the Executive, but belonged

ought to have a power which had been delegated to the heads of the other parts of the Empire. The Warrant of Appointment of Lord Chelmsford, therefore, contained the following new clause :

'We do hereby authorize and empower you in Our name, and on Our behalf, to grant to any offender convicted in the exercise of its criminal jurisdiction by any Court of Justice within Our said Territories, a pardon, either free, or subject to such lawful conditions as to you may seem fit.' The same power was delegated to Lord Chelmsford's successors through the Instrument of Instructions. In 1937 this delegation was effected through the Letters Patent creating the office of Governor-General.[1]

This delegation of the royal prerogative probably made little practical difference, though it enhanced the position of the Governor-General. In strict law, however, there was some difference. For a free royal pardon 'extends far more than merely acquitting of punishment. It is, in fact, a purging of the offence'.[2] A full remission of sentence under the Criminal Procedure Code saves the convicted person from the physical consequences of the court's judgement but the guilt remains, while a free pardon under the delegated royal prerogative not only saves the person convicted from the punishment but also takes off the guilt. Accordingly, if a case arose in which it was desirable to grant a free pardon with these consequences, it would be open to the Governor-General to do so, but only in virtue of his delegated prerogative.

Sec. 295 (1) of the Government of India Act, 1935, provides :

'Where any person has been sentenced to death in a Province, the Governor-General in his discretion shall have

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to the Governor-General in Council. On this subject Ilbert says : 'Whether and in what cases the Governor-General has the prerogative of pardon has been questioned. The power is not expressly conferred on him by his Warrant of Appointment, but it would be strange if he had not a power possessed by all Colonial Governors. However, the power of remitting sentences under the Code of Criminal Procedure makes the question of little practical importance.' (*Government of India*, p. 203.) The analogy of Colonial Governors is not helpful for the simple reason that this power was expressly delegated to them.

[1] Cl. 2. See Appendix A.

[2] per Pollock, B., in Hay *v.* Tower Justices. 24 Q.B.D., 561=62 *Law Times*, 290.

all such powers of suspension, remission or commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act.' With this exception ' no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province '. Proviso 2 to the Section, however, says : ' Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment.'

The present position, therefore, is as follows :

In respect of a person under sentence of death in a Province, after 1 April 1937, the Governor-General has the statutory right of suspending the execution of his sentence, of commuting it for any other punishment, and of remitting it. In respect of any other sentence, say transportation or imprisonment, the Governor-General has no right of intervention. But Proviso 2 to Sec. 295 saves the right of the Governor-General, if it is delegated to him, to grant pardons, reprieves, respites or remissions of punishment. And the power of pardon, as already stated, has been delegated to him.

In conformity with the Act of 1935 consequential changes have been made in the Indian Penal and Criminal Procedure Codes by the Government of India (Adaptation of Indian Laws) Order, 1937. In Secs. 401 and 402 of the Criminal Procedure Code all references to the Governor-General in Council have accordingly been omitted. Similar omission has been made in Sec. 55 of the Indian Penal Code.[1]

This exclusion of the Central Government is based on the principle that in a scheme of Provincial Autonomy the Central or Federal Government as such ought not to have jurisdiction in a matter which essentially falls within the sphere

[1] In Sec. 54, however, for the words ' The Government of India or the Government of the place ' the words ' The Central Government or the Provincial Government of the Province ' have been substituted. The use of the words ' Central Government ' in this section appears to be repugnant to Sec. 295 (1) of the Government of India Act, 1935. In fact this is not so. For this latter Section refers to Governors' Provinces and the amended Sec. 54 of the Indian Penal Code authorizes the Central Government to intervene in respect of a sentence of death in a Chief Commissioner's Province where the question of Provincial Autonomy does not arise.

of law and order in the Province. The power given to the Governor-General is based on his character as the King's representative rather than the head of the Central Government.[1]

Other Administrative Powers

In respect of the Executive Council the Governor-General's powers were (and still are) considerable. He makes rules and orders for the more convenient transaction of business in his Executive Council. He is President of the Council and controls its deliberations. He has, besides, the right to overrule the Council in respect of any measure which, in his judgement, essentially affects the safety, tranquillity or interests of British India or of any part thereof.[2] The Governor-General had, and still has, important administrative powers with respect to the Indian Legislature. The right of summoning, proroguing and dissolving either Chamber of the Indian Legislature belongs to him. He has also the right of extending its life indefinitely. He allots the days for the transaction of non-official business in the Indian Legislature. He has the right of addressing the Indian Legislature and requiring the attendance of its members. He may disallow a resolution or a motion or part of a motion (including an adjournment motion) on the ground that it cannot be moved without detriment to the public interest or on the ground that it relates to a matter which is not primarily the concern of the Governor-General in Council.

THE GOVERNOR-GENERAL: FINANCIAL POWERS

As to the specific financial powers of the Governor-General, no proposals for taxation or for the appropriation of revenue or moneys for any purpose could or can be made without his recommendation. In case of emergency the Governor-General has power to authorize such expenditure as may, in his opinion, be necessary for the safety or tranquillity of British India or any part thereof.[3]

[1] In the Provinces the power of suspension, remission and commutation is exercised by the Ministry, subject, of course, to the Governor's intervention if his special responsibility is involved.

[2] Government of India Act, Secs. 39, 40, 41, continued in force by Government of India Act, 1935, Sec. 317 (1).

[3] See Government of India Act, Sec. 67A (2), (8), continued in force by Sec. 317 (1) of Government of India Act, 1935.

The Governor-General: Legislative Powers

The legislative powers of the Governor-General were, and still are, wide and far-reaching. He is an integral part of the Indian Legislature. When a Bill has been passed by both the Chambers of the Indian Legislature, the Governor-General may assent to it, in which case it becomes an Act of the Indian Legislature. He may veto the Bill or he may reserve it for the signification of His Majesty's pleasure. Or he may return the Bill for reconsideration by either Chamber. After such reconsideration, the Bill will come back to him, when he has to take any of the courses of action just stated.[1]

Formerly, the Governor-General's previous sanction was required for the introduction into either Chamber of the Indian Legislature of any Bill affecting :

(1) The public debt or public revenues of India, or imposing any charge on the revenues of India ; or

(2) the religion or religious rights and usages of any class of British subjects in India ; or

(3) the discipline or maintenance of any part of His Majesty's military, naval or air forces ; or

(4) the relations of the Government with foreign Princes and States ; or any measure—

(i) regulating any provincial subject, or any part of a provincial subject, which had not been declared by rules under the Act to be subject to legislation by the Indian Legislature ; or

(ii) repealing or amending any Act of a local Legislature ; or

(iii) repealing or amending any Act or Ordinance made by the Governor-General.[2]

[1] See Government of India Act, Secs. 63, 68, 67 (4), continued in force by Government of India Act, 1935, Sec. 317 (1).

[2] Government of India Act, Sec. 67 (2). At present also legislation on a large number of important subjects requires the previouss anction of the Governor-General. See Chap. 16.

If the Governor-General certifies that any Bill or any clause of a Bill or any amendment to a Bill affects the safety or tranquillity of British India or any part thereof and directs that no proceedings or no further proceedings be taken thereon, effect has to be given to such direction. Where either House refuses leave to introduce a Bill or fails to pass it in a form recommended by the Governor-General, he may certify that the passage of the Bill is essential for the safety, tranquillity or interests of British India or any part thereof. In that case if the Bill has already been passed by the other House, it will become an Act of the Indian Legislature immediately after the Governor-General signs it. If the Bill has not been already passed by the other Chamber, it will be presented to it. If the Bill is passed by that Chamber in the form recommended by the Governor-General, it will become an Act of the Indian Legislature, on the Governor-General's assent being given. Even if the Bill is not so passed, it will still become an Act of the Indian Legislature on signature by the Governor-General.[1]

The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof. Such ordinances have the force of law for a period of not more than six months.[2]

Under the old Act, the Governor-General had important powers in respect of legislation by Provincial Legislatures. A Bill passed by a Provincial Council and assented to by the Governor, required the assent of the Governor-General before it became valid. When a Provincial Act was presented to him, the Governor-General could either assent, or refuse his assent to it, or recommit it to the Provincial Legislature. The Governor of a Province might, instead of giving his assent, reserve a Bill for the consideration of the Governor-General. In respect of certain Bills reservation was obligatory. The Governor-General might assent to a reserved Bill or veto it or send it for reconsideration ; or he might reserve it for the consideration of the King. Where a Governor passed, by certification, an Act relating to a reserved subject, he had

[1] Government of India Act, Secs. 67 (2A), 67B, continued in force by Government of India Act, 1935, Sec. 317 (1).

[2] Government of India Act, Sec. 72, continued in force by Government of India Act, 1935, Sec. 317 (1).

forthwith to send a copy thereof to the Governor-General. The latter had to reserve it for the consideration of the Crown and the Act could come into force only after the King's assent was received and notified. In an emergency, however, the Governor-General could give immediate effect to the Act by signifying his own assent thereto.

Further, without the previous sanction of the Governor-General, a Provincial Legislature could not take into consideration any law :

(1) imposing or authorizing the imposition of any new tax unless the tax was a tax scheduled as exempted from this provision by rules made under the Act ; or

(2) affecting the public debt of India, or the customs duties, or any other tax or duty for the time being in force and imposed by the authority of the Governor-General in Council for the general purposes of the government of India, provided that the imposition or alteration of a tax scheduled as aforesaid was not to be deemed to affect any such tax or duty ; or

(3) affecting the discipline or maintenance of any part of His Majesty's naval, military, or air forces ; or

(4) affecting the relations of the Government with foreign Princes or States ; or

(5) regulating any central subject ; or

(6) regulating any provincial subject which had been declared by rules under the Act to be, either in whole or in part, subject to legislation by the Indian Legislature, in respect of any matter to which such declaration applied ; or

(7) affecting any power expressly reserved to the Governor-General in Council by any law for the time being in force ; or

(8) altering or repealing the provisions of any law which, having been made before the commencement of the

Government of India Act, 1919, by any authority in British India other than that Local Legislature, was declared by rules under the Act to be a law which could not be repealed or altered by the Local Legislature without previous sanction ; or

(9) altering or repealing any provision of an Act of the Indian Legislature made after the commencement of the Government of India Act, 1919, which by the provisions of such first-mentioned Act could not be repealed or altered by the Local Legislature without previous sanction.[1]

The Governor-General in Council : Administrative Powers

Subject to the provisions of the Act and the Rules made thereunder, the superintendence, direction and control of the civil and military government of India was vested in the Governor-General in Council.[2] Within India the Governor-General in Council was supreme.

The executive functions of the Governor-General in Council may be grouped under three heads. Firstly, the administration of the central subjects ; secondly, the administration of all subjects in centrally-administered areas, that is, the Minor or Chief Commissioners' Provinces. The executive authority of the Government of India (i.e. the Governor-General in Council) was, and is, complete, in theory and in practice, in so far as these two heads are concerned.[3] Thirdly, the Government of India had full power of superintendence, direction and control over Provincial Governments in respect of 'reserved' subjects, and limited power of control and supervision in respect of 'transferred' subjects. The Governor in Council was bound to obey the orders of the Government of

[1] Government of India Act, Secs. 81, 81A, 80A (3), 72 E. For the present powers of the Governor-General in respect of provincial legislation, see Chap. 16.

[2] Government of India Act, Sec. 33.

[3] British Baluchistan is now administered by a Chief Commissioner under the direct control of the Governor-General alone. See Government of India Act, 1935, Sec. 95 (1).

India and to keep them fully informed of his actions.[1] Nothing of importance could be done without the approval of the Government of India and the latter could always force their will. In practice, however, the Provincial Governments had considerable powers and their opinions had great weight.

The Government of India exercised large control over Provincial legislation. As already stated, certain Bills required the previous sanction of the Governor-General under Sec. 80A (3) of the Government of India Act. The Section was so wide that a very large number of Provincial Bills used to come up for previous sanction. This enabled the Departments of the Government of India to control the Provincial Governments. In respect of legislation regarding reserved subjects not falling under Sec. 80A (3), if the legislation was of considerable importance, Provincial Governments were required by executive order to submit the Bill to the Government of India. In both the cases the actual submission of a Bill was normally preceded by negotiation between the Government of India and the Provincial Government concerned.

The Governor-General in Council and the Indian States

The exercise of the Crown's power of paramountcy in respect of the Indian States was an important power of the Governor-General in Council. As a matter of fact, however, this power was largely exercised by the Governor-General himself. At present, this power is exercised by the Crown Representative who is, in fact, the same person as the Governor-General.

The Governor-General in Council : Financial Powers

The specific financial power of the Governor-General in Council in respect of the Central Budget was, and still is, the

[1] Government of India Act, Secs. 45 (1), 45A (3) and Devolution Rule 49. The constant private communication between the provincial Governors and the Governor-General afforded an additional means of control. No new policy of any importance was ever initiated by them without consultation with, and the concurrence of, the Governor-General. See *Simon Commission Report*, vol. I, par. 191.

right to restore any demand for a grant which has been refused or reduced by the Assembly, on certifying that it is essential for the discharge of his responsibility for the subject.[1]

Governor-General in Council : Legislative Powers

Under the old Act, the Governor-General in Council could make Regulations having the force of an Act of the Indian Legislature in respect of any part of British India to which this provision was made applicable by the Secretary of State in Council. The Local Government concerned had to propose the draft of any such Regulation. After approval of the draft by the Governor-General in Council, it had to be assented to by the Governor-General.[2]

The Governor-General in Council had, and still has, wide rule-making powers. These are of two kinds :

(1) Rules made under the Government of India Act. (These rules regulated such matters as elections, classification of subjects, etc.)

(2) Rules made under Acts of the Indian Legislature.

[1] Government of India Act, Sec. 67A (7), continued in force by Government of India Act, 1935, Sec. 317 (1).

[2] Sec. 71.

4

THE PRIVATE SECRETARIAT OF THE GOVERNOR-GENERAL

In the previous chapter we have made a survey of the varied and enormous powers which the Governor-General possesses. But the Governor-General does not function in a vacuum. A proper estimate of his position, therefore, requires an adequate understanding of the machinery in and through which he acts. This machinery comprises (1) the personal secretariat of the Governor-General and (2) the regular machinery of the Government of India.

As stated before, the Governor-General maintains a very large establishment. At the head of this establishment and occupying a position of considerable trust, responsibility and influence, is the Private Secretary to the Viceroy or, in his usual designation, the P.S.V.[1]

The Private Secretary is appointed by the Viceroy in his unfettered discretion. Private Secretaries have been drawn from various sources, but the majority of them have come from the ranks of the Indian Civil Service.

As to the duties and responsibilities of the Private Secretary, one of the most important, although very indefinite, is his function as an observant head of the Viceroy's personal staff. The Military Secretary to the Viceroy directly controls the Viceroy's staff and establishments (except the P.S.V. and his office) and is thus responsible for the social side of Viceregal activity. But the P.S.V. has to keep his eye on the working of the staff and to ensure that it carries out its duties with courtesy, tact and efficiency.

The P.S.V. is in charge of the private correspondence of the Viceroy on public affairs. This correspondence is very extensive as well as important. The Viceroy corresponds

[1] The more correct title, however, would be 'Private Secretary to the Viceroy and Governor-General'.

regularly with the King, the Secretary of State for India, the Governors of Provinces, and occasionally with the British Prime Minister and the Governors-General of the Dominions. Besides, there is correspondence with Indian Princes and British Indian politicians. Naturally, owing to the Viceroy's many preoccupations, the responsibility for collecting the material for this, and preparing the narrative portion of it, falls largely on him.

Twice a year the Viceroy submits his recommendations for honours through the Secretary of State to the King. This entails a collation by the P.S.V. of the recommendations received from Governors and Members of the Executive Council, and a decision by the Viceroy as regards the names which he considers most deserving to go forward. As the number of recommendations received by the Viceroy is usually far in excess of the vacancies in the Orders concerned, the decisions entail most careful discrimination. The same process takes place as regards Indian titles, save that here the Viceroy is the final authority. Further, a number of very confidential letters and telegrams also passes connected with the recommendation of persons for posts, the appointment to which is vested in the Crown.[1]

The collection of material for the speeches of the Viceroy is a very important part of the P.S.V.'s duties. His Excellency delivers a number of speeches on public affairs every year. He addresses the Central Legislature once every session and the Chamber of Princes twice a year. He usually makes a speech at the opening of the Annual Meeting of the Associated Chambers of Commerce, and there are numerous other occasions at headquarters or on tour. The material for these speeches has to be collected from the Government of India offices and from the Governors of Provinces; and often when the bulk of the speech has been prepared, Members of Council or Governors have to be informed of its contents and their advice sought on various points before the speech is actually delivered. When the speech is of special importance, portions of it are

[1] For, except in the case of the Presidency Governors, it is the Governor-General who, in the first instance, suggests names and explains the qualifications and claims of the persons concerned.

communicated in advance to the Secretary of State for his approval. State banquets in Indian States or durbars for the investiture of a Ruler with his powers are the chief occasions upon which the Viceroy makes speeches in Indian States.

In official matters, the P.S.V. is the nexus between the Governor-General and the Members of the Executive Council and the Secretaries to the Government of India. The P.S.V. is responsible for the arrangement of work with the Viceroy. This takes the form of allotting from half an hour to an hour a week to each Secretary to the Government of India, and rather a longer period to the Secretaries of the Foreign and Political Department, as in the latter case the Governor-General is the member in charge of the portfolio. Each Member of the Executive Council receives an hour a week. These functionaries, during the period allotted to them, try to place before the Viceroy for discussion and orders the most urgent and important cases in their respective Departments; but it frequently happens that all these cannot be shown to him in the period assigned. In such cases they are left with the P.S.V. to whom the points for discussion are explained. He is responsible for obtaining the Governor-General's orders upon them when he gets an opportunity, and for returning them to the Departments. In addition, each week in each Department there are numerous cases which, for want of sufficient time, cannot be put up to the Viceroy at the weekly interview and are too urgent to wait until the corresponding period in the ensuing week. These cases also come to the P.S.V., so that he may obtain the Governor-General's orders upon them.[1]

It is the P.S.V.'s duty to obtain the papers of cases set down for discussion at the next Council, and to present them to the Viceroy for his perusal at least a day before the meeting. The P.S.V. keeps a record of every order in Council. He also ascertains from the Secretaries and the Members what cases they have discussed with the Viceroy at their weekly interviews and how these cases stand. All other cases which come to the

[1] In very urgent and important cases it is possible for Members or Secretaries to get an interview with the Viceroy before the next weekly interview. This must be arranged through the P.S.V.

Viceroy pass through his hands ; so he is in a position to know the stage at which every case of importance in the Government of India stands and to keep the Viceroy acquainted with its progress.

Another range of the activities of the P.S.V. is connected with applications from individuals for interviews with the Viceroy, or by groups of representatives of communities or Societies, Chambers of Commerce and associations to be received in deputation for the purpose of presenting addresses. As regards interviews, the P.S.V. has to determine the really important cases by a process of careful selection. Consultation with the Governors or the Members of Council is often necessary in order to determine the really important cases. The subject-matter of a request to bring a deputation is nearly always concerned with an official responsibility of the Government of India or of a Provincial Government, and is *prima facie* susceptible of disposal by one of those authorities. The greatest care is, therefore, required in selecting cases in which the Viceroy may properly agree to receive a deputation ; consultation with the Member and the Secretary of the Department of the Government of India concerned, or with the Governor of a Province, as the case may be, is always necessary before permission is accorded. The draft of the address to be presented is sent beforehand to the P.S.V., who again consults the Government of India or the Governor of the Province concerned before framing a draft reply. The reception of a deputation often has a useful effect in cases where some event has aroused great public excitement or in cases where it is desired fully to explain the policy of the Government of India or of His Majesty's Government and other early public opportunity is lacking owing to the Legislature being in recess. It is also useful to receive deputations from Chambers of Commerce, etc., at great centres of commerce and industry, such as Calcutta and Bombay, as this enables the Governor-General to announce and review the policy and operations of a number of Departments of the Government affecting trade, commerce, shipping, transport, finance, and so on, in a single pronouncement.

The P.S.V. is responsible for keeping the Viceroy in

touch with public opinion as expressed in the press, both in England and India, upon public affairs in India. For this purpose, assisted by the A.P.S.V., he has to read, mark and take cuttings from a large number of newspapers daily, and also make selections from the translations of the newspapers in Indian languages which reach him from the Publicity Bureau of the Government of India, and to place these cuttings and translations before His Excellency. It is also part of his duty to establish close relations with the representatives of newspapers at the headquarters of Government and of press agencies, such as Reuter and the Indian News Agency, to grant them frequent interviews and to see that they are supplied with early and accurate information on matters which can and should be made public.

In the Central Administration there is no Premier responsible for a co-ordinated policy and for presenting to the public and the press a complete picture of the various activities of the Departments of the Government fitted into an intelligible and reasoned policy. The tendency, where this state of things exists, is for the emphasis to be placed on departmental work. The Viceroy in his speeches, and the P.S.V. in his relations with the press, have to bear this in mind and to ensure the presentation to the public of the true picture of interrelated activity of various branches of the Government.

Every Viceroy is threatened with submersion in a sea of work. One of the vital functions of the P.S.V. is to act as a filter between the Governor-General and the administrative Departments and to ensure that only matters of first-rate importance come before him, so that he has sufficient leisure, unhampered by routine, to give thought to the larger questions.

From the nature of things, the Governor-General, set at the head of a great administration, engrossed in weighty affairs of state and clothed with the dignity and station of the King's Viceregent, is placed in a position of peculiar isolation, shut off from many sources of information, and handicapped in sensing public opinion by the circumstances of his office, which are quite different from those in which the head of a

political party or of an administrative Department works. In these circumstances it is essential that the P.S.V. should act as an extra pair of eyes and ears for his chief, and should endeavour to ensure that on matters of moment the Viceroy should not be at any disadvantage in arriving at his decision through lack of accurate information regarding the facts or through any misconception of the strength or nature of public opinion. How far, considering the ranks from which the Private Secretary is drawn and the circles in which he normally moves, he is able efficiently to discharge this function is, to put it mildly, extremely doubtful.

The importance of the P.S.V.'s office in the functioning of the Governor-General must be evident. 'The position of Private Secretary', says Smith, 'is unlike any other office in any country. . . . To a man of ability and tact the power is vast, alike in patronage and in influence upon the ruler's policy.[1] No Governor-General can do half his work as it ought to be done without trusting others, and the man he most trusts is his Secretary.'[2] Lord Curzon, a most competent judge on this subject, writes :[3]

'The peculiar position and environment [of the Governor-General], and the nature of his work, have tended to invest the post of Private Secretary in India with a greater distinction than attaches to any corresponding office in public life in England : for he is the intermediary between his chief and every class of person in India. . . . Hence the P.S.V., as he has been designated since the days of Lord Canning, is as important and sometimes a more influential personage in the

[1] The following incident related by the biographer of Sir Mortimer Durand, sometime Private Secretary to Lord Ripon, is highly instructive in this context. The author tells us that Ripon's inclination was to go with the Indians in everything and despise European opinion. Primrose, the P.S.V., was all on the same lines and his particular friends among the Indians were the worst set. He used to communicate freely with the Editor of the *Amrita Bazar Patrika* who, in the author's estimation, was 'a low, seditious scoundrel'. Sisir Kumar Ghose had met the Viceroy before, but when he applied for an interview, Durand said to Ripon : 'I would not see him, Sir. He is a low blackguard of no position, and his paper is a tissue of insults to Englishmen.' Ripon declined to interview Ghose ! It remains to add that Ghose was very much respected for his character and ability, and was one of the most important men of his time. See Sykes, *The Life of Sir Mortimer Durand*, p. 130.

[2] Smith, *Twelve Indian Statesmen*, p. 146.

[3] *British Government in India*, vol. II, p. 126.

Indian hierarchy than a Member of Council or even a Governor.'

Under the old constitution the only really important office in the Secretarial staff of the Governor-General was that of the Private Secretary. Provision for this staff was made by the Governor-General in Council and not by the Governor-General. Under the Act of 1935 the Governor-General, in his discretion, appoints his own secretarial staff, and the salaries and allowances of the persons appointed are determined by the Governor-General in his discretion.[1] In view of the large responsibilities thrown on the Governor-General by this Act, it is contemplated that he should have a strong personal Secretariat.[2]

[1] Sec. 305.

[2] Already a few new appointments have been made, e.g. those of Secretary and Joint Secretary to the Governor-General (Public) and Secretary to the Governor-General for Defence Co-ordination. The last post is different from that of the Secretary, Defence Co-ordination Department, who is a Secretary to the Government of India. The P.S.V.'s present designation is: Secretary to the Governor-General (Personal) and Private Secretary to His Excellency The Viceroy.

5

THE GOVERNMENT OF INDIA—EARLY METHODS OF TRANSACTION OF BUSINESS AND THE POSITION OF THE GOVERNOR-GENERAL

THIS and the following five chapters are devoted to a detailed study of the machinery of the Government of India and of the Governor-General's place therein. In the present chapter we discuss the relation between the Governor-General and his colleagues in the Executive Council in the past, the early method of transacting Governmental business, the introduction of the portfolio system and its effect on the position of the Governor-General.

Ever since the beginning of the East India Company, government in India has been government by Council. This Council or Committee form of government reflects the commercial origin of British administration in India. The acquisition of territorial sovereignty and the need for vigour and decision in the government of an expanding empire led to the vesting of more and more powers in the chairman of the Council ; but the fundamental principle of collective rule has remained to this day.

The form of executive provided for the Company's trading stations by the earliest charters was quite simple. The business of a factory was managed by a council, the senior member of which was known as President or Governor. By the year 1700 there were three Presidencies of co-ordinate rank and authority ; and the government of each Presidency was vested in a President or Governor and Council appointed by the Company. The Council, usually varying in size between twelve and sixteen, consisted of the senior civil servants of the Company. 'All power was lodged in the President and Council jointly, and nothing could be transacted except by a majority of votes.'[1]

[1] Ilbert, *The Government of India*, p. 42.

Circumstances sometimes necessitated departure from this principle of collective rule.[1] Many of the Members of Council were also heads of subordinate factories in the interior and were frequently absent from its meetings at headquarters. Thus its size and composition made the Council increasingly unsuited for the efficient discharge of its ever-widening duties.

The Regulating Act of 1773, which was the first Parliamentary intervention in Indian administration, entrusted the government of the Presidency of Bengal to a Governor-General and Council of four members, all appointed by name for five years. The Act definitely laid down that decisions of the Council were to be by a majority of the votes of those present, the Governor-General having a second or casting vote in case of a tie. This was no novel provision, since this practice was already prevalent in the Presidencies.[2] Undoubtedly one of the intentions of the Act was to prevent independent action on the part of the Governor-General, such as that of Hastings in respect of the Begums of Oudh. Its immediate result was, however, to make him practically impotent in his own Council. Pitt's Act of 1784 sought to strengthen the Governor-General's position by reducing the number of Councillors to three, by denying them any fixity of tenure, and by giving the Directors the right of appointing Councillors from among the covenanted servants of the Company.[3] Further, an Act of 1786[4] authorized the Governor-General to override his Council and act on his own responsibility in respect of measures 'whereby the interests of the [Company], or the safety or tranquillity of the British possessions in India, or in any part thereof, are or may, in the judgement of the Governor-General, be essentially affected'. Such overriding power was exercisable only in the case of measures placed before the Council in their executive capacity, and not in their judicial or legislative capacity.[5]

[1] Clive, for instance, was given sole authority by the Madras Council when he went out to Bengal. Vide Keith, *A Constitutional History of India*, p. 30.

[2] This was, however, different from the normal practice in the Colonies, 'where the Governor was advised by a Council but not effectively controlled by it, having in emergency the right to displace members, and being normally responsible for recommending their appointment'. Keith, ibid., p. 76. cf. Keith, *Constitutional History of the First British Empire*, pp. 191 ff.

[3] They were liable to dismissal either by the Crown or by the Directors.

[4] 24 Geo. III, c. 16.

[5] ibid., Sec. 11.

It was expected that this power 'would tend greatly to the strength and security of the British possessions in India, and give energy, vigour and dispatch to the measures and proceedings of the executive government',[1] and would fix the responsibility for the Government of India on the Governor-General personally.[2]

'The practical result of this measure', observes Sir George Chesney, 'was to render the power of the Governor-General supreme. The Councillors subsided from the position of active members of an executive board into the subordinate one of witnessing and occasionally advising on the proceedings of their president.'[3] The real significance of this extraordinary power lies more in its potentiality as an effective weapon in the armoury of the Governor-General against a recalcitrant Council than in its actual use. As a matter of fact, since 1870, this power appears to have been availed of only on one occasion.[4] This was done in 1879 by Lord Lytton in order to remove the import duty on British textiles. This case deserves careful consideration.

The growth of an indigenous cotton industry in India was looked upon with alarm and disfavour by the Lancashire vested interests which demanded the abolition of duties on imported cotton goods. The Tariff Act of 1875 was passed without effecting the alteration insisted upon. This annoyed Lord Salisbury, Secretary of State, who strongly suggested the abolition of the cotton duty in order to placate the English manufacturers. In view of their financial difficulties, the Government of India in their reply maintained that in the interests of India the duty could not be reduced. The House of Commons passed a resolution urging the abolition of the duty, and the Lancashire interests continued their pressure on the Government. In the meantime Lord Northbrook, the

[1] 24 Geo. III, c. 16, Sec. 7.

[2] ibid., Sec. 8.

[3] Chesney, *Indian Polity*, 3rd ed., p. 45.

[4] Lord Curzon and Professor Keith on the authority of a statement by Wolf in his *Life of Ripon* (vol. II, p. 164) observe that Lord Ripon overruled his Council in 1881 on the question of the evacuation of Kandahar. It appears, however, that Lord Ripon had no occasion to do so, as the matter was decided by the British Cabinet over the head of the Government of India. See Curzon, op. cit., vol. II, pp. 73-4; Keith, *A Constitutional History of India*, p. 172 n. 1.

Governor-General, resigned because of a difference of opinion with Lord Salisbury on another question, and in his successor the Conservative Government found a pliant tool.

In 1879 the proposal for abolition of cotton duties came up before the Executive Council. It was supported by Lord Lytton, the new Viceroy, and two Members, of whom one was Sir John Strachey, the Finance Member ; while the majority, that is, the other four members, were strongly opposed. Eventually[1] Lord Lytton overcame their opposition by exercising his overriding power. A notification under Sec. 23 of the Indian Sea Customs Act was issued exempting from customs duty all imported cotton goods containing yarns not finer than 30S. Commenting on this action Sir H. W. Norman, then a member of the India Council, observed : 'The Viceroy was straining the law to an extent that is very undesirable, and that in my experience is unprecedented.'[2] Sir W. Muir, another member, remarked : 'How the object came to be magnified in the Viceroy's eyes, so as to warrant exercise of the extraordinary prerogative, it is not easy to understand. Still the law leaves the occasion absolutely in the Viceroy's discretion and that seems all that can be said on the matter.'[3] It is true, as Maine argued,[4] that 'Lord Lytton had full discretionary power' and 'the sole question of a legal nature is whether the exercise of this discretion is "reasonable", that is, as may be attributed to an intelligent man acting in good faith'. In other words, could the action of Lord Lytton be justified on the ground that the interests of India were 'essentially affected' ? On the facts of the case it is absolutely clear that the Government of India could hardly sacrifice such a source of revenue at that moment. As Sir A. J. Arbuthnot, a dissentient member of Lord Lytton's Council, remarked, 'And this has been done at a time when we are engaged in a war ;[5] when we have very recently emerged

[1] On 13 March 1879. Vide Lady B. Balfour, *Lord Lytton's Indian Administration*, p. 482.

[2] Dissenting Minute to Secretary of State's Financial Dispatch, No. 261 of 17 July 1879, to Lord Lytton approving his action. Vide *Parliamentary Papers*, 1878-9, vol. 55, pp. 332 ff.

[3] ibid., pp. 332 ff.

[4] ibid., pp. 332 ff.

[5] A costly war with Afghanistan in which India was involved by the imperialistic and haughty action of Lord Lytton.

from a calamitous famine; when we have in consequence re-imposed direct taxation of a notoriously unpopular . . . and often of an oppressive description."[1] The reasons given by Sir Henry Maine in justification of the Governor-General's action are amusing. He argued that the British dominion was of 'inestimable value' to India. On the other hand the Indian connexion was positively disadvantageous for England: (i) her foreign policy was affected by it; (ii) 'the indefinite liability fastened on her by difficulties of Indian finance causes legitimate anxiety to English statesmen'; and (iii) all Englishmen had to do the distasteful thing of 'reviewing and qualifying their fundamental political maxims' because of the relation of their country to India. England's motives for preserving the connexion were (*a*) partly the pride in Empire and (*b*) possibly the sense of benefit of English rule to India. But 'the one solid, tangible, material interest which Great Britain has in India, is its interest in Indian trade', the importance of which was very great at that time because of the protectionist reaction all over the world. The Indian cotton duty undoubtedly hampered English interests, 'but to a far greater extent are the interests of India essentially affected', for it weakened Britain's material interest in India. There was the contingency of a great calamity to India, if the English people eventually thought that they had not enough material interest in India to justify the connexion.[2] Granting for the sake of argument the validity of all that Maine says, it amounts to the assumption that any policy which promoted British interests was necessarily in the interests of India. Surely this could not be the sense which the expression 'interests of India' was intended to convey. Quite clearly, this was not a measure which was essentially necessary in the interests of India.

Lord Lytton's use of his overriding power in this case put too great a strain on the meaning of the law. His action clearly showed that, since the Governor-General was the sole judge of an occasion for the use of this power, there was no legal safeguard whatever against its abuse, save in so far as he was

[1] Vide *P.P.*, 1878-9, vol. 55, pp. 345 ff.
[2] ibid., pp. 332 ff.

restrained by the Secretary of State.[1] Two other points deserve mention in this context. Firstly, there was a sudden reversal of a deliberate action of Government to which many of the colleagues of the Governor-General were deeply committed. Apart from the intrinsic merits of the case, the dissentient Members of Council must have been largely influenced by a desire for consistency and a sense of personal prestige and honour. Having been active participants in a certain definite policy, they could not stultify themselves by quietly acquiescing in its instant reversal. Secondly, the chief impelling force behind the Governor-General's action was the influence of the British Cabinet and Parliament. It is most unlikely that a Governor-General would overrule the majority of his Council without the clear support of the Secretary of State.

Until the time of Lord Canning the method of transacting Governmental business was fundamentally different from what it has been since. Although in the past the affairs of government were organized in Departments, each in charge of a Secretary, the control and management of all Departments of Government were vested in the Governor-General and the Council in their collective capacity. No Member of Council, not even the Governor-General, was head of any Department. 'The law recognized only a Governor-General in Council, and by the Governor-General in Council all business was carried on.'[2]

The first Lord Minto described the system as follows:

'The Secretaries in the different departments send in circulation to me and the Members of Council the dispatches they have received since the last Council, and the documents relating to all business which arises in the interval. These are extremely voluminous, and would require pretty nearly the whole interval for mere perusal. The number and variety of affairs is also immense; for everything, small as well as great, must have the sanction of Government, and instead of being transacted by the Secretaries as in England, must be

[1] The fact of dissent of the majority and the use of overriding power by the Governor-General would hardly be known to the outside world unless Parliament asked for papers.

[2] Chesney, op. cit., p. 121.

actually stated, and the orders given, in Council. A declaration of war, and an estimate for an addition to a barrack a thousand miles off, may come next to each other in the Secretaries' bundle.'[1] An extraordinary burden lay on the shoulders of the Governor-General 'who had to lead off in every case, not only with an opinion, but by setting out the issues on which opinions must be recorded'.[2] Dalhousie did not exaggerate when he remarked: '. . . A Governor-General is unlike any other Minister under heaven—he is the beginning, middle and end of all. Everything is his business, and everything that is in progress must be begun by him, and is invalid until it is concluded by him.'[3]

Apart from the unusually heavy burden that the system imposed on the Governor-General, it resulted in incredible delays and consequent congestion of business. The papers would come before the Council very often after having 'pursued their weary way, possibly following the Governor-General on a tour of 500 miles or more into the interior'.[4]

It is surprising how such a dilatory, inefficient and unbusinesslike system endured for so long a period. 'The only reason', truly says Sir John Strachey, 'that enabled such a system to last so long was that in matters requiring

[1] Countess of Minto, *Lord Minto in India*, p. 26. Letter to Hon. Gilbert Elliot (later second Lord Minto), dated 15 September 1807. Lord Ellenborough (Governor-General, 1842-4) described the transaction of Council business as follows: 'Formerly the Council met twice a week, when the Secretaries of the different departments were introduced, and all the business accumulated since the last meeting was transacted. The reading of the letters, their discussion, and the making of orders often occupied the Council from eleven to five o'clock and frequent delays and accumulations of business took place. He then proposed that all the letters should be sent to him in the first instance, and that in each case where he had no doubt he would write in pencil what should be done, and in those on which he wished to advise with the Council he would write 'Reserve'. The letters would then be sent round to the Council, and if any Member doubted the expediency of what he proposed, or wished to consult his colleagues, he would write 'Reserve' on the letter, and the matter would then be brought before the Council at the next meeting . . . The result was that instead of sitting six hours, the Council generally rose in an hour and a half.' See *Hansard*, ser. 3, CLXIV, 1861, p. 946.

[2] Chesney, op. cit., p. 123. Practically all papers were circulated to all the Members of Council, in order of seniority, beginning with the Governor-General. See Curzon, op. cit., vol. II, p. 120.

[3] Baird, *Private Letters of Marquess Dalhousie*, p. 136. Letter to his friend Sir George Couper, dated 11 August 1850.

[4] Curzon, op. cit., vol. II, p. 120.

prompt and vigorous action it was not really acted upon."[1] In other words, the rigour of the law was avoided by its breach as occasions arose.

Wellesley furnishes the most extreme instance of utter disregard of the law and usage in this matter. The Council's share in Government was reduced by him almost to nothing. The Board, as he derisively called the Council, ' was seldom consulted till after the event '.[2] He usually acted on his own authority and responsibility. Wellesley would issue important orders in his own name rather than in the name of the Supreme Council. Thus in 1803 instructions were issued by the Governor-General giving General Wellesley, his brother, and General Stuart plenary powers for purposes of war and peace with the Peshwa.[3] He also slighted his Council by frequently absenting himself from its meetings, though physically present in Calcutta.

While Wellesley remedied the admitted dilatoriness of normal Council procedure by the violent method of its virtual supersession, his able successor Lord Dalhousie, not less impatient of delay, sought to improve the procedure by systematizing it. Thus, on his arrival, Dalhousie used to receive ' all the " boxes ", and either orally or in writing gave his directions upon their contents '. Three months after assuming office, he wrote : ' Nothing comes to me now until ripe for decision ; the mere working up the case I throw on the officer, holding the Secretaries responsible for its being done effectively and without delay. It is brought up when ready ; decided ; the order issues and no order issues without my sanction.'[4]

Dalhousie reduced the burden of unnecessary work in another way. ' Formerly the orders on every paper originated with the Governor-General. Under my plan it is only the orders on the important papers of each Department which he

[1] Strachey, *India—its Administration and Progress*, 3rd ed., p. 58.

[2] Chesney, op. cit., p. 122.

[3] The Directors felt uneasy on this matter and sought legal opinion. The two Counsel who were consulted gave it as their clear opinion that the action was unwarranted by the law. Wellesley was censured for this by the Home Authorities. Pearce, *Life and Correspondence of Wellesley*, vol. II, ch. XIII.

[4] Baird, *Private Letters of Marquess Dalhousie*, p. 22, letter to Couper, dated 3 April 1848.

originates.'[1] In all the three Presidencies Dalhousie found a practice of minute-writing 'to which there is no end'. He limited the amount of writing to one minute on a subject. If a difference of opinion was disclosed he expected his Council to meet for a final adjustment of their differences.[2] How this method helped the speedy disposal of business, Dalhousie illustrated by referring to his draft of the Oudh Treaty. 'All four Members of Council in their minutes recorded different views. . . . By giving in a little myself they have given in too, and we have arrived at an agreement in which we are all cordial and one. This is the effect of doing the work by personal discussion in Council. Had we proceeded by way of minutes, I doubt whether we should ever have come to a unanimous decision at all; while any decision would probably have cost us eight weeks instead of eight days.'[3]

Dalhousie estimated that not less than 20,000 to 25,000 papers were annually submitted for the Governor-General's orders. 'By systematizing; by causing an analysis or a précis of each paper to be made by the officers; by making them dispose of each paper on its progress, not troubling me with it till it is ripe for my orders (unless my orders should be indispensable during its progress); . . .', by all these rules Dalhousie made the Secretaries lighten his work. 'Even thus', he wrote, 'the labour is incessant, and my performance of it unsatisfactory to myself.'[4]

If the satisfactory discharge of work was found difficult by a man of Dalhousie's genius and administrative capacity, working long hours a day, a less able successor was bound to find the work impossible, especially when there was a considerable accession of new territories and expansion of the work of Government. The outbreak of the Mutiny terribly aggravated

[1] Baird, *Private Letters of Marquess Dalhousie*, p. 318. Letter to Sir George Couper, dated 9 September 1854.

[2] Lee-Warner, *Life of Dalhousie*, vol. I, p. 111. cf. Curzon, vol. II, p. 121: 'The first check that I can discover as having been placed on (the) solemn and dilatory perambulation of the files was the work of Lord Dalhousie . . . who instituted the plan of taking papers in Council after one circulation and one writing of notes—previously they had wandered about in a circuitous movement that might continue for months or even for years.'

[3] Baird, *Private Letters of Marquess Dalhousie*, p. 364, letter to Couper dated 13 January 1856.

[4] ibid., pp. 227-8.

the situation ; and the pressure of business in all the Departments increased enormously. Canning met the crisis by abandoning the long-established collective method of transacting business, and by introducing the rudiments of the present departmental system.[1]

The innovation introduced by Lord Canning, though vital in nature, was at best a make-shift arrangement. It was obviously unwarranted in law which required that every order or proceeding of the Government of India should be an order or proceeding of the Governor-General acting with his Council. The result even of the rudimentary departmental system was, in fact, so beneficial and the necessity so compelling that Canning urged the Home Authorities to give the *imprimatur* of the law on the change inaugurated. 'The fault of the present constitution of Council', observed Canning,[2] 'is the waste of labour and the delays that it entails. This has been mitigated of late, but not so much as it might be. It has arisen chiefly from the fact that the wording of the law and long usage appear to prescribe that every Act of the Governor-General in Council beyond those of mere routine (and not always excepting these) must be done with the actual consideration and concurrence of all the Members of the Council. This tradition was not long ago broken through ; but not without misgivings on the part of some Members of the Government as to whether they were not unduly divesting themselves of a responsibility fixed upon them. A division of departments has, however, to some extent taken place, and the result has been good.

'I would recognize this division by law, and I would carry it out more distinctly.'

Accordingly, Lord Canning proposed that the Governor-General should have the power to place each Member of the

[1] This plan is said to have originally been suggested by Sir J. P. Grant. See *Edinburgh Review*, April 1870, p. 308. The appointment in 1859 of J. Wilson as a Member of Council in specific charge of the financial business of Government, was the first outward recognition of the introduction of the new system. The incorporation of the Legal Member in the Supreme Council under the Act of 1853 meant no departure from the old practice, as he was not given executive charge of any Department.

[2] Canning to Sir Charles Wood, 26 January 1861, quoted in Curzon, op. cit., vol. II, pp. 121-2.

Council in charge of such Department of the Government as he might think fit, and that, subject to any regulations which the Governor-General in Council might lay down, the orders of that Member should be held to be the orders of the Governor-General in Council. As to what questions should be submitted to the whole Council, he suggested that 'the practice should be regulated as in the English Cabinet by good understanding and common sense, and by the paramount authority of the head of the Government'.

Canning's suggestion became the basis of Sec. 8 of the Act of 1861. It authorized 'the Governor-General from time to time to make rules and orders for the more convenient transaction of business in [his Executive] Council; and any order made or act done in accordance with such rules and orders' was to be deemed as an order or act of the Governor-General in Council.[1] The entire superstructure of Executive Government in India on Cabinet lines has since been built on the foundation of the simple and apparently innocuous provision of Sec. 8 of the Act of 1861.

The introduction of the portfolio system had important results. It ensured greater speed and efficiency in the dispatch of governmental business. Its effect on the respective positions of the Governor-General and the Members of his Council was also considerable. Under the previous system the Supreme Government was a 'consultative council' deliberating under the chairmanship of the Governor-General who had the initiative in all business and under whose immediate control and orders the Secretaries in the various Departments worked. The Members of Council had no initiative in any matter. They had no Departments under their charge and no right to issue any orders. Members had no function or responsibility until their opinion was sought, either by the circulation of a

[1] The Indian Councils Act, 1861, Sec. 8. Canning recommended that the Governor-General should be given the power to place a Member of Council in charge of a Department and that orders of that Member in respect of that Department should be treated as orders of the Governor-General in Council, subject, however, to any regulations laid down by the Governor-General in Council. Under the Act the Governor-General was not only empowered to allocate different Departments among Members of Council but he alone was to lay down rules as to when an order of a Member in charge of a Department was to be regarded as an order of the Government. It is the Governor-General who could, and still can, restrict or enlarge the freedom of action of Members.

case or by its presentation to the Council for their consideration. Under the new system, Councillors gained as individuals what they lost as a body ; many matters which formerly came before the Council being now disposed of in the Departments. There was, however, no substantial diminution of the importance of the Council, since in the main only routine matters and problems of minor importance were withdrawn. Further, the new procedure made it possible for the Council to deal with matters of moment with greater effectiveness. Moreover, a Member of Council now ceased to be ' an adviser leisurely minuting in his own hand on papers referred to him ', and assumed the rôle of a responsible administrator of one of the great Departments of the Government of India. Members were no longer passive collaborators in the work of government without individual responsibility, but, as recognized heads of Departments, began to dispose of numerous cases either on their own responsibility or after consultation with the Governor-General.

Besides, the new system led to the taking of initiative in other and more important matters arising in the Departments by Members in charge thereof ; and, in view of their direct responsibilities, their opinions were bound to carry considerable weight in meetings of the Council.

The new procedure by making Members of Council heads of Departments, by giving them initiative in the business of their respective charges, and by permitting them to decide a large part of the business of their own Departments, reacted somewhat unfavourably on the authority of the Governor-General. He lost the initiative[1] in business belonging to Departments other than his own ; and in respect of certain matters decisions could be made without his knowledge or approval. Secretaries in the various Departments, except his own, were no longer under his direct orders but became subordinate to the different Members of Council. On the

[1] Writing to Sir Stafford Northcote, Secretary of State for India, on 9 April 1867, Lawrence remarked, ' With the present system of division of work in the Council, and the limited influence which, from one circumstance or the other, the Governor-General possesses, it is very difficult for him to get a thing done when the Councillor of a Department desires to keep it back.' See Bosworth Smith, *Life of Lord Lawrence*, vol. II, p. 517.

other hand, it must be remembered that the Government of India had 'long outgrown the dimensions which enabled Dalhousie to work each Department and to originate all discussion himself'.[1] The introduction of division of labour relieved the Governor-General of a great deal of relatively unimportant work and thus made possible the effective control and supervision of the really important work of each Department. Moreover, the Governor-General retained in his own hands one of the most important Departments of State, the Foreign Department, in the administration of which he was now more independent of his Council than before. Further, the Governor-General had the power of framing the 'rules of business' and thereby determining the extent and limits of the independent sphere of action of Councillors; and Secretaries had, under the rules so framed, the right as well as the duty of bringing to the notice of the Governor-General all matters of importance arising in their respective Departments.

With the expansion of territories it became necessary for the Governor-General, on administrative as well as political and military grounds, to visit other parts of India, sometimes for long periods. The Council always remained in Calcutta, and when in 1790 Cornwallis left for the Carnatic to assume personal control of the operations against Tipoo Sultan, the Supreme Council authorized the Governor-General alone to exercise the full powers and authority of the Government. This procedure was regarded as of doubtful legality and an Act[2] was passed to validate it. The inconvenience arising out of the Governor-General's separation from Council was sought to be removed by the Act of 1793. It provided that whenever the Governor-General was absent from Bengal he was to nominate one of the Councillors as Vice-President and Deputy Governor of Bengal, and the Vice-President with the Council was to exercise, in respect of Bengal, the same powers as the Governor in Council had in the government of Madras or Bombay.[3]

[1] *Edinburgh Review*, April 1870, p. 308.
[2] 31 Geo. III, C. 40.
[3] 33 Geo. III, C. 52, Sec. LIII. The Governor-General was authorized, while absent from Council, to issue orders, to the officers and servants of the other Presidencies.

Under the Act of 1833 it was laid down that, whenever the Governor-General in Council should declare it expedient for the Governor-General alone to visit any part of India, it would be lawful for the Governor-General in Council to nominate as President one of the Members of Council who, during the Governor-General's absence, would have the powers of the Governor-General at meetings of the Council. On every such occasion the Governor-General in Council could pass a law authorizing the Governor-General alone to exercise all powers of the Governor-General in Council, except the power of making laws and regulations. This power was frequently used and Acts of the Governor-General in Council were passed in those terms.[1] This solution was, however, unsatisfactory. Disputes arose between the Governor-General and the President in Council regarding their respective jurisdictions. The existence of two distinct and separate Governments of India, each with full legal powers in the same sphere, made such controversies all but inevitable.[2]

The procedure during the Governor-General's absence from Calcutta was thus described by Sir Henry Maine :

'The Governor-General's Council remained [at Calcutta] under a President, invested nominally with the full powers of the Governor-General in Council. In point of fact, however, a division of business was made between the Governor-General in the Upper Provinces and the President in Council at Calcutta on the principle of leaving to the latter all business which was of a simple, routine or commonplace character. Everything which was of importance went direct to the Governor-General, and there was either a rule or an understanding that, if any matter which came before the President in Council assumed the least importance, it should be sent on to the Governor-General.'[3]

[1] cf., e.g. Act XXIV of 1848 of the Governor-General in Council.

[2] At the time of Dalhousie, for instance, there was a quarrel between the Governor-General and the President in Council over the Sikhim question. The latter claimed 'co-equal and co-ordinate authority with the Governor-General during his absence from the Council in respect of the powers reserved to him, and an exclusive and complete authority in respect of all powers expressly left to themselves'. This claim was, of course, rejected by the Secret Committee. Vide Lee-Warner, *The Life of Dalhousie*, vol. I, pp. 378-81.

[3] Sir Henry Maine's Minutes, No. 70, dated 16 March 1868, p. 168.

'When the Governor-General goes away from Calcutta on such occasions,'[1] said Sir Charles Wood, 'he generally takes with him, as it is called, the political and military powers, which enable him to direct the political movements in India, but he leaves with his Council at Calcutta all the powers necessary for conducting the general administration of India.'[2]

The degree to which a Governor-General, separated from his Council, acted on his own responsibility depended to a large extent on the character of the individual in question. In urgent and important matters, such as those with which Dalhousie or Canning had to deal, the share of the Council in Calcutta was necessarily negligible. On the other hand, the disposal of important business was held up in Calcutta until the arrival of the Governor-General. Lawrence found so much congestion of business and administrative delay[3] that he was faced with one of two alternative courses : either the Governor-General should not be absent from the capital, or he should take his Council with him. As he liked the climate of Simla and as the means of communication had improved, he adopted the latter course in 1864. Since then the practice has been continued and the Governor-General has not been separated from his Council except for very short periods. This reform ended the undesirable duplication of Government, ensured greater dispatch of business and made the Members of Council more effective participants in the work of Government.

[1] He referred to Hardinge accompanying the Army and Dalhousie going up to the Punjab.

[2] Speech on the Bill of 1853 (3 June 1853). See *Hansard*, Ser. 3, vol. CLXIV.

[3] Under this system, as Maine observed, 'important papers sometimes went three times over 1,500 miles, between the Governor-General in the Upper Provinces and the Council at Calcutta'. See Maine's Minutes, p. 169. 'All that Sir John Lawrence did,' wrote Maine in his Minute of 2 December 1867, 'instead of leaving his Council with a sort of mock independence at Calcutta, was to destroy a costly and mischievous practice by summoning them to accompany him to Simla.' See Curzon, op. cit., vol. II, p. 123.

6

THE DEPARTMENTS OF THE GOVERNMENT OF INDIA AND THE EXECUTIVE COUNCIL

THE business of the Government of India, like that of every well-ordered Government, is conducted in and through various Departments.

The number of Departments and their functions have varied from time to time on account of the necessity for the more efficient performance of existing functions or the need of providing for new services. Thus, towards the end of Hastings' administration, the work of the then Bengal Government was done in five Departments—Public, Secret, Revenue, Military and Inspection.[1] Coming to a much later period, we find that when Lord Dalhousie became Governor-General, the work of the Government of India was transacted in four great Departments—Home, Foreign, Military and Finance. He created a new Department for Public Works by relieving the Home Department of some of its functions. The Departments remained five in number until 1869, when Lord Lawrence's Government created a sixth Department, the Legislative Department, which had hitherto been a branch of the Home Department. Lord Mayo effected further changes by creating the Department of Revenue, Agriculture and Commerce. At the time of Lord Lytton, this Department was abolished and its subjects were tacked on to other Departments, Agriculture and Revenue being handed over to the Home Department and Commerce to the Finance Department. During Lord Ripon's Viceroyalty, Revenue and Agriculture were formed as a separate Department. A new Department of Commerce and Industry was formed at the time of Lord Curzon. The Curzon-Kitchener controversy[2] resulted in the splitting up of the Military Department, in 1906, into two—the Army Department and the Military Supply Department. The

[1] Vide *Home Series* (*Miscellaneous*), vol. 238, pp. 277-83 (India Office).
[2] For the details, see Ronaldshay, *Life of Curzon*, vol. II, ch. XXIX.

latter was abolished in 1909. A separate Department of Education was created in 1910. In 1914 a Political Department was carved out of the Foreign Department, but the following year they were re-united under the name of the Foreign and Political Department.

A separate Department of Industries was created in 1921. In 1923 the number of Departments was nine, namely, (I) Home, (II) Army, (III) Finance, (IV) Commerce, (V) Railway, (VI) Foreign and Political, (VII) Industries and Labour, (VIII) Legislative, (IX) Education, Health and Lands. In 1930 a Legislative Assembly Department was created. Strictly speaking, it is not a Secretariat Department at all. Another Department, the Imperial Council of Agricultural Research Department, was constituted in 1930. A further new Department, the Reforms Office, was created as a temporary Department in May 1930.[1] The name of the Army Department was more appropriately changed into that of the Defence Department. The partial inauguration of the Government of India Act, 1935, on 1 April 1937 and the consequent withdrawal of the important subject of relations with the Indian States from the purview of the Governor-General and of the Government of India, have resulted in the complete severance of the political functions of the Foreign and Political Department and the creation of a separate Department—the Political Department. This Department is under the absolute control of the Crown Representative, a legal entity wholly distinct from the Governor-General and the Government of India. This Department, in strict law, forms no part of the Government of India Secretariat. The Foreign Department has been renamed the Department of External Affairs.[2]

A Department of Communications was created with effect from 8 November 1937.[3] At present the Departments are :

[1] *Legislative Assembly Debates*, 7 April 1934, vol. IV, p. 3366. Sir B. L. Mitter's answer to a question.

[2] This change is in conformity with the wording of the new Act. See Sec. 11 of the Act. This new designation of the Foreign side of the Foreign and Political Department took effect from 1 April 1937.

[3] There is no longer any Department of Industries. Some of its important functions have been transferred to the Department of Communications, some to other Departments, and the rest of its functions are now dealt with in the Labour Department. Vide *The Gazette of India*, 6 November 1937.

(I) External Affairs, (II) Legislative, (III) Legislative Assembly, (IV) Finance, (V) Home, (VI) Defence, (VII) Commerce, (VIII) Railway (Railway Board), (IX) Education, Health and Lands, (X) Imperial Council of Agricultural Research, (XI) Communications, (XII) Labour and (XIII) the Reforms Office.[1]

Apart from the normal Secretariat Departments, the work of the Government of India is also conducted in certain Attached Offices and Boards. Attached Offices are created 'in order either to cope with entirely new developments or to enable increasing attention to be given to older subjects which have assumed increasing importance'.[2] They are attached to one or other of the Departments. The heads of these Offices are known as Heads of Departments and their position is inferior to that of the Secretaries of the Departments to which these Offices are attached.

The Railway Board and the now defunct Indian Munitions Board are the only two recent instances of the Board method of procedure. A Board has a definitely higher status than an Attached Office. 'This form of organization implies the appointment of one or more high officers, above the Secretary, charged with definite functions and responsibilities for particular branches of work, and subject to the supreme authority of the President of the Board or the Member in charge of the Department. They meet periodically as a Board to discuss the larger questions of policy.'[3] The Railway Board is, really speaking, a Department of the Government of India, though its internal organization is different from that of the rest. A Member of the Executive Council is in charge of this Department, and the Financial Commissioner of Railways is in the position of a Secretary in any of the normal Civil Departments.

The principal functions of the various Departments are stated below.[4]

[1] Two Departments were created recently:—the Defence Co-ordination Department and the Supply Department.

[2] *Wheeler Report*, 1936, par. 5. Instances of Attached Offices are the Indian Stores Department, the Central Board of Revenue, office of the Director of Public Information.

[3] *Llewellyn Smith Committee's Report*, 1919, par. 81.

[4] This statement relates to the period immediately preceding the re-organization of Departments in November 1937.

A. Legislative Department : All business relating to :

(i) Legislation in the Indian Legislature.

(ii) Legislation in Provincial Legislatures.

(iii) Rules and Standing Orders for the conduct of business in the Indian Legislature.

(iv) Proceedings of the Council of State.

(v) The publication, translation and supply to Government officers and the public of Acts of the Indian Legislature and Regulations under Section 71 of the Government of India Act.

(vi) The nomination and election of members of the Indian Legislature.

(vii) The preparation and publication of Codes other than Codes appertaining to Provinces which have Legislative Assemblies, Statute Books, Digests, General Rules and Orders and other similar works.

(viii) Unofficial references for opinions from other Departments.

(ix) The League of Nations.

(x) The duties of Solicitor to the Government of India.

B. Legislative Assembly Department : All business connected with :

(i) The duties imposed on the Secretary of the Legislative Assembly by the Rules and Standing Orders for the conduct of business in the Legislative Assembly, and

(ii) The proceedings of the Legislative Assembly.

C. Home Department :

(i) Internal politics.

(ii) Law and justice.

(iii) Police.

(iv) Jails.

(v) The Indian Arms Rules.

(vi) The Indian Civil Service.
(vii) The Minor Administrations of Delhi, Andaman and Coorg and Ajmere-Merwara.
(viii) Registration.
(ix) Naturalization of Aliens.
(x) Census.

D. Finance Department :
(i) General Finance.
(*a*) The public accounts and estimates.
(*b*) The public expenditure.
(*c*) The public ways and means.
(*d*) The management of the public funds.
(*e*) Taxation.
(*f*) Provincial and local finance.
(*g*) The borrowing by public bodies.
(ii) Customs.
(iii) Taxes on Income.
(iv) Salt.
(v) Opium.
(vi) Excise.
(vii) Stamps.
(viii) Currency and Banking.
(ix) Salaries and Allowances.
(x) The Civil Accounts Department and Treasuries.
(xi) Army Finance.
(xii) The Military Accounts Department.

E. Commerce Department :
(i) Shipping and matters connected with it : e.g. Lascars, ports, docks, inland navigation, fisheries.
(ii) Trade and Commerce, including
(*a*) Commercial intelligence and statistics,
(*b*) Company Law (excluding banking law),
(*c*) Tariff and excise duties (excluding administration),
(*d*) Foreign and internal trade.

(iii) Life Assurance.
(iv) Actuarial Work.
(v) Import and Export Regulations.
(vi) Exhibitions outside India.

F. Foreign and Political Department :[1]

(i) External Politics.
(ii) Relations with foreign States beyond the limits of India.
(iii) Consular appointments.
(iv) Passports.
(v) Indians overseas in all territories under the A mandate, in those administered by a foreign power under a B or a C mandate, in Egypt, and outside the Empire.
(vi) The control of relations with the frontier tribes.
(vii) Control of the administration of Baluchistan and the Pargana of Manpur in British India, and of all places in Indian States administered by the Governor-General in Council.
(viii) Extradition and extra-territoriality.
(ix) The political service.
(x) Political prisoners.
(xi) Political pensions.
(xii) Relations with the Indian States and feudatories.
(xiii) Indian State forces.
(xiv) Chiefs' College.
(xv) British and Indian titles.
(xvi) Ceremonials.

G. Defence Department :

(i) Army.
(ii) The Indian Navy.
(iii) Air Force.

[1] Since 1 April 1937 the Political Department has been separated and placed under the Crown Representative. The Foreign Department is now called the External Affairs Department.

(iv) Cantonments and Cantonment Magistrates' Departments.

(v) Indian Medical Service.

(vi) Marine Surveys.

H. Education, Health and Lands Department :

(i) Education. Certain central institutions, e.g. Benares and Aligarh Universities. Certain co-ordinating functions.

(ii) Examinations in Russian and Tibetan.

(iii) Records.

(iv) Books and publications.

(v) Reformatory schools.

(vi) Archaeology and Epigraphy.

(vii) Medical institutions and the Civil Medical Services exclusive of officers on the political cadre.

(viii) Medical Research : Central institutions.

(ix) Public Health.

(x) Survey of India.

(xi) Central agencies for research.

(xii) Botanical Survey of India.

(xiii) Zoological Survey of India.

(xiv) Administration of Indian Emigration Act : Indians overseas within the Empire, in territories administered by any part of the Empire under a B or C mandate, Haj pilgrimage.

(xv) Local self-government in centrally-administered areas.

I. Imperial Council of Agricultural Research Department :

(i) All business connected with the administration of the Imperial Council of Agricultural Research.

(ii) Cess imposed by the Indian Lac Cess Act, 1930.

J. Industries and Labour Department :[1]

(i) Development of industries (Central aspects).
(ii) Industrial Exhibitions (Central aspects).
(iii) Geology and Minerals.
(iv) The Indian Explosives Act.
(v) The Indian Petroleum Act.
(vi) Printing and Stationery.
(vii) Patents and Designs.
(viii) Copyright.
(ix) Legislation relating to steam-boilers and electricity.
(x) Inter-provincial migration.
(xi) Stores.
(xii) Labour legislation.
(xiii) International Labour Organization.
(xiv) Meteorology.
(xv) Post Office.
(xvi) Telegraphs.
(xvii) Telephones.
(xviii) Wireless telegraphy.
(xix) Cables.
(xx) Civil aviation.
(xxi) Civil buildings.
(xxii) Communications.
(xxiii) Miscellaneous Public Works.
(xxiv) Ecclesiastical Affairs.

K. Railway Department :

(i) Railway questions.
(ii) Tramways outside municipal limits.

[1] With effect from 8 November 1937 the new Department of Communications has been dealing with the subjects of Broadcasting, Civil Aviation, Meteorology, Ports, Pilotage and Inland Navigation, Posts and Telegraphs (including Cables and Wireless) and Roads ; from the Department of Industries and Labour the subjects of Industries, Stores, Patents and Designs have been transferred to the Commerce Department, Copyright to the Education, Health and Lands Department, and Ecclesiastical Affairs to the Defence Department. Vide *Gazette of India*, 6 November 1937.

(iii) Rope-ways for the public carriage of goods and passengers.

L. Reforms Office :

All matters relating to constitutional reform.

The administration and control of the Departments vests in the Governor-General in Council, that is, the Governor-General in Executive Council.

The number of Members of the Executive Council has varied from time to time. Its strength of four Members under the Act of 1773 was reduced to three by Pitt's Act of 1784, at which figure it stood until 1833 when a fourth or Legislative Member was added. This Member could sit or vote only at meetings of Council for the purpose of making laws and regulations. 'It was only by courtesy, and not by right, that he was allowed to see the papers or correspondence, or to be made acquainted with the deliberations of Government upon any subject not immediately connected with legislation.'[1] By the Act of 1853 the Legal Member was made a full Member of Council. The appointment in 1859 of J. Wilson to look after the finances of the Government of India left the Council without a Member with juristic qualifications. Accordingly, the Act of 1861 added a fifth ordinary Member to the Council. An Act of 1874 authorized the appointment of a sixth ordinary Member for Public Works purposes.

Under the consolidated Government of India Act, 1915, the Executive Council was to consist of six ordinary Members with the Commander-in-Chief as an extraordinary Member, if he were so appointed by the Secretary of State in Council.[2] This statutory limitation of the number of Members of Council was done away with by the Act of 1919, which provides that the number shall be such as His Majesty thinks fit to appoint.

[1] Sir Barnes Peacock's Minute of 3 November 1859, quoted in Ilbert, op. cit., p. 83. See also Maine's Minutes, Nos. 42 and 204.

[2] Sec. 37 (2) of the Act of 1915, which reproduced the provision of an earlier enactment (24 and 25 Vict. C.67. Sec. 9), provided that 'when and so long as the Council assembles in any province having a Governor, he shall be an extraordinary Member of the Council'. In practice this was a dead letter because the Council did not meet in such places. This provision was deleted by the Act of 1919.

In fact, however, there are six Members of the Executive Council, apart from the Commander-in-Chief.[1]

Three of the four Members of Hastings' Council were drawn from outside the Company's service. The experiment proved a failure and Pitt's Act confined all the three Members to the covenanted service of the Company. The fourth or Legal Membership created in 1833 had to be filled from outside. The Act of 1861 required that three of the five ordinary Members must have been in service in India for at least ten years. The present law is that three at least of the Members must have been in the service of the Crown in India for at least ten years, and one must be a barrister of England or Ireland, or a member of the Faculty of Advocates of Scotland, or a pleader of a High Court, of not less than ten years' standing.[2]

The service Members are almost invariably taken from the Indian Civil Service. There was no Indian element in the Executive Council until 1909, when the late Mr (afterwards Lord) Sinha was appointed Law Member. Shortly before the introduction of the Montagu-Chelmsford Reforms, the number of Indian Members was raised to three. There is no legal provision on this point, but that is the accepted practice.

Members of the Executive Council hold office normally for a period of five years. This practice dates back to the

[1] With the Commander-in-Chief the number is seven. Originally the Commander-in-Chief was one of the Members of Council. By the Act of 1793 he was excluded, but power was given to the Court of Directors to appoint him as an extraordinary Member. This was re-enacted in the Charter Act of 1833. The Indian Councils Act, 1861, contained the same provision, the Secretary of State in Council being subsituted for the Court. The consolidating Act of 1915 incorporated the same provision. Hence a distinction was made between ordinary Members and the extraordinary Member. Under this optional clause the Commander-in-Chief has always been given a seat in the Executive Council. The Act of 1919 makes no distinction between ordinary and extraordinary Members. It does not, like its predecessors, provide in terms for the appointment of the Commander-in-Chief as a Member. His eligibility is roundly recognized by the provision that, if he is a Member of the Council, he will have rank and precedence next after the Governor-General.

[2] Government of India Act, Sec. 36 (3), continued in force by Sec. 317 (1) of the Act of 1935. Thus indirectly the minimum number of Members of the Executive Council is fixed by the Act at four. Further qualifications may be prescribed by Rules in respect of Members of the Governor-General's Executive Council. No such rules have, however, been made.

Regulating Act which fixed the term of Councillors at five years. In strict law the tenure is 'during pleasure'.[1]

Members of the Executive Council are appointed by His Majesty by Warrant under the Royal Sign Manual, that is, on the advice of the Secretary of State for India.[2] Unlike the case of the Governor-General, the Prime Minister has nothing to do with these appointments. In practice, the voice of the Governor-General is usually decisive. Curzon greatly underrates, if he does not misrepresent, the part played by the Governor-General when he observes :

'He [the Governor-General] does not appoint a single one of his immediate colleagues. Indeed, on the solitary occasion on which I pressed for one such appointment, I was informed by the Secretary of State that the duty of advising the King on the choice of a Member of Council rested solely with him, and that no greater violation of the Constitution could be imagined than that this duty should degenerate into a mere formal submission to His Majesty of the views and recommendations of the Viceroy !'[3] Lord Lawrence was annoyed because a nominee of his was passed over. 'The Governor-General', he observed, 'is responsible for the working of the whole government of India, and yet he cannot be trusted for the selection of a member of his own Council.'[4]

The occasion to which Curzon refers was the choice of the new Military Supply Member, and was an offshoot of the Curzon-Kitchener controversy.[5] The Cabinet was terribly afraid of offending Kitchener and decided the long-drawn issue against Curzon in 1905. The latter was apparently

[1] It is interesting to note that, although the law is silent on the question of the tenure of the Governor-General and of the Members of his Council, the Warrant of appointment of the former makes his office tenable 'during pleasure'. But no such expression is used in the Warrants appointing the Members of Council. In the case of the High Court Judges the practice was to take a promise from the persons to be appointed that they would retire at the age of 60. There is no such practice in respect of Members of the Executive Council. The Crown can, of course, always terminate such appointments.

[2] ibid., Sec. 36 (1). In a very rare case the King may raise objection as Edward VII did when Morley proposed the appointment of Sinha. See Morley, *Recollections*, vol. II, p. 302.

[3] Curzon, op. cit., vol. II, p. 110.

[4] Bosworth Smith : *Life of Lord Lawrence*, vol. II, p. 513.

[5] For the details, vide Ronaldshay, *Life of Lord Curzon*, vol. II, ch. XXIX.

soothed by the concession made, namely, the creation of a Military Supply Department. He proposed, and pressed to the point of his own resignation, the appointment of Sir E. Barrow to this post. The Secretary of State felt that this particular gentleman was so much wedded to the old system that he could not be trusted with the task of re-organization. He believed that the unwelcome controversy might be revived as a result of Barrow's appointment, and informed Curzon that this appointment involved an important principle decided upon by the Cabinet. Eventually Curzon's nominee was rejected. But it must be remembered, as St John Brodrick reminded the Viceroy, that two previous vacancies in the Executive Council were filled on his nomination. As regards the case mentioned by Lawrence, it is stated that Lord Cranbrook, Secretary of State, was amenable, but the appointment was given to a nominee of the Council of India with whom it practically rested.[1]

Cases in which the strongly expressed recommendation of the Governor-General is rejected are bound to be extremely rare. For the Governor-General is the man on the spot ; and he, and not the Secretary of State, knows the respective merits of the persons available.[2] Further, no prudent Secretary of State is likely to compel a Governor-General to accept a Member of Council against his will. Since the Governor-General is responsible for the efficient and smooth working of the Government of India, his recommendations must, save in very exceptional circumstances, be confirmed.

In filling a vacancy in the Executive Council the initiative is invariably taken by the Governor-General. In a private letter to the Secretary of State he writes that, after considering the cases of X, Y and Z, he recommends X for the office. Usually one name is thus recommended. Lord Reading followed this procedure, and presumably other Governors-General have acted in the

[1] Vide Bosworth Smith, *Life of Lord Lawrence*, vol. II, p. 513.

[2] Only in respect of the Finance Member, who is often appointed from the British Treasury, the Secretary of State may have the determining voice. However, Sir Basil Blackett was definitely appointed on Lord Reading's initiative. Even otherwise, the approval of the Viceroy is presumably obtained by the Secretary of State before finally recommending anybody to the King.

same way.[1] After receiving the recommendation, the Secretary of State formally submits the name to the King. In theory, the Governor-General has no responsibility in the choice of his colleagues, and in the last resort the Secretary of State can always assert his constitutional right, but this fact should not lead one to underrate the importance of the procedure followed which makes the Governor-General's influence dominant.[2]

Lord Canning, we have seen, introduced the portfolio system. Since then each Department of the Government has been in charge of the Governor-General or a Member of the Executive Council, though each and all of them are legally under the control of the Governor-General in Council. The Governor-General has, since 1861, the statutory power of making rules and orders for the more convenient transaction of business in his Executive Council. The allocation of Departments is made by order of the Governor-General by virtue of this power. Neither the Government of India Act nor the Warrant of Appointment[3] of a Member of Council assigns any Department to any Member or any Member to any Department. The only instance of the law specifically assigning particular duties to a Member is provided by the Act of 1874[4] which gave the Crown the option of appointing a sixth ordinary Member of Council 'who shall be called the Member of Council for Public Works Purposes'. Sir A. Clarke took his seat on 15 June 1875, as the first Member of

[1] Lord Minto discussed the merits of Mukerjee (Sir Asutosh) and Sinha in his letter to Morley, but finally recommended Sinha who was, therefore, appointed. See Minto, *India, Minto and Morley*, p. 285.

[2] Those who are appointed to the Executive Council know quite well to whom they owe their appointments. In the appointment of the Commander-in-Chief the Viceroy practically plays no part. The Commander-in-Chief is appointed by the King on the advice of the Secretary of State for War.

[3] The usual form of Warrant of Appointment is as follows: '. . . Whereas A.B. is about to vacate the office of Member of the Executive Council of Our Governor-General of India: Now know that We reposing great trust and confidence in your zeal, discretion and integrity have appointed and by these presents appoint you the said C.D. to be a Member of the said Executive Council of Our Governor-General of India in the room and place of the said A.B.' The warrant of Sir Theodore Hope was the only exception in this regard. This recited the provisions of the Act of 1874, and appointed him, 'to be an ordinary Member of the Council of Our Governor-General of India for Public Works Purposes'. See his Warrant of Appointment, dated 5 September 1882.

[4] 37 and 38 Vict., c.91.

Council for Public Works Purposes under this Act. The post was not filled in 1880 when a vacancy occurred on the termination of Clarke's tenure of that office. The only other appointment under the Act was that of Mr (later Sir) Theodore Hope in 1882.[1] An amending Act[2] was passed in 1904 repealing the specific requirements of the Act of 1874. Legally, any Member may be placed in charge of any Department.[3] Even the requirement of certain definite legal qualifications in one of the Members under Sec. 36 (3) of the Act does not imply that he must be placed in charge of the Legislative Department. Legally, this Member might be given charge of, say, the Home Department, and another Member without any legal qualifications might be given the Legislative portfolio.

Besides, under the law it is not necessary that a Member of Council must have a Department to administer. Since 1906 every Member has, in fact, been the head of one or more Departments. Until that year the Commander-in-Chief, though invariably a Member of the Executive Council, had no portfolio: that is to say, he was not in administrative charge of any Department of the Secretariat. He was the executive head of the Army, but the Military Department of the Government of India was in the portfolio of an ordinary Member of Council popularly called the Military Member. Under the re-organization scheme of 1906 the Department was split up into two—the Army Department of which the Commander-in-Chief was made the head, and the Military Supply Department which was given over to the former Military Member. The latter Department had so little work to do that it was abolished in 1909, and the Commander-in-Chief became the head of the entire Army Department. Strictly speaking, the Legal Member of Council was originally without any portfolio. The Legislative Department formed a branch of the Home Department. The Law Member,

[1] Hope's tenure expired in December 1887.

[2] The Indian Councils Act (4 Edw. VII, C.26).

[3] 'Indeed, the whole Departmental system is purely Executive, and might be, as it often has been, readjusted by an Executive order.' Sir James Stephen, in Hunter's *Life of Earl of Mayo*, vol. II, p. 147.

though intimately associated with the Legislative Department, was not its administrative head. The Legislative Department was made a separate Department in 1869 with the Law Member as its head.[1]

In this connexion two things must be noticed. First, the Governor-General has always been in charge of some Department or Departments.[2] The practice began right from the beginning of the portfolio system when Lord Canning took under his own charge the Foreign Department. His example has been uniformly followed by all his successors. Lord Mayo took an additional portfolio, the Public Works Department. Lord Ripon temporarily held the portfolio of Finance during the illness of the Finance Member, Mr Baring (later Lord Cromer). The Legislative Assembly Department, created in 1930, is in the portfolio of the Governor-General. The Reforms Office is also in the portfolio of the Governor-General. Secondly, there are usually more Departments than there are Members. Some Members have, therefore, more than one portfolio. The division of Departments in 1937 (before the partial introduction of the new Act) was as follows :

1. The Governor-General	1. Foreign and Political Department 2. Legislative Assembly Department 3. Reforms Office
2. The Commander-in-Chief	Defence Department
3. Sir Henry Craik	Home Department
4. Sir Nripendra Sircar	Legislative Department
5. Sir James Grigg	Finance Department
6. Sir Zafrullah Khan	1. Commerce Department 2. Railway Department

[1] See Ilbert, op. cit., p. 205 ; Stephen in Hunter's *Life of Earl of Mayo*, vol. II, p. 149.

[2] Under the law the Governor-General need not hold any portfolio at all.

7.	Sir Jagdish Prasad	1. Education, Health and Lands Department
		2. Imperial Council of Agricultural Research Department
8.	Sir Frank Noyce	Industries and Labour Department.[1]

[1] After 8 November 1937, the Departments were allotted as follows :

1.	The Governor-General	1. External Affairs Department
		2. Legislative Assembly Department
		3. Reforms Office
2.	The Commander-in-Chief	Defence Department
3.	Sir Nripendra Sircar	Legislative Department
4.	Sir Henry Craik	Home Department
5.	Sir James Grigg	Finance Department
6.	Sir Zafrullah Khan	1. Commerce Department
		2. Labour Department
7.	Sir Jagdish Prasad	1. Education, Health and Lands Department
		2. Imperial Council of Agricultural Research Department
8.	Sir Thomas Stewart	1. Communications Department
		2. Railway Department.

The Departments of Defence Co-ordination and of Supply, both recently created, are in the portfolios of the Governor-General and the Law Member respectively.

7

THE ORGANIZATION OF DEPARTMENTS AND SECRETARIAT PROCEDURE

THE internal organization of all Departments is not uniform. Broadly speaking, there is a Secretary at the head of each normal Secretariat Department. The entire Secretariat staff falls into two distinct categories : the higher secretariat or the 'officers' class, and the subordinate establishment usually termed 'the office'. There are four regular grades of officers : Secretary, Deputy Secretary, Under Secretary, and Assistant Secretary. Sometimes there is an Additional Secretary and, rather frequently, a Joint Secretary, next after the Secretary. The other category consists of Superintendents, Assistants, Second Division clerks and Third Division clerks.

The higher secretariat or 'officers class' are recruited primarily from the Indian Civil Service[1] and partly from the other Imperial Services except that the lowest class of officers, Assistant Secretaries, are usually promoted from subordinate ranks in the Secretariat, belonging to the Imperial Secretariat Service Class I. The Government of India has no Indian Civil Service of its own. An Indian Civil Service probationer on arrival in India is assigned to one or other of the Provinces. The Government of India supplements the personnel of the Central Services by indent upon the Provinces. 'The theory is that adequate provision is made for these posts in the different provincial cadres both by specific provision for so

[1] A definite number of superior appointments in the Secretariat are specially reserved for the Indian Civil Service under Statutory Rules. Thus in 1935, the following posts were so reserved : Home Department : 1 Secretary, 1 Joint Secretary and 1 Deputy Secretary. Finance Department : 1 Secretary, 1 Deputy Secretary and 1 Financial Adviser, Military Finance. Education, Health and Lands Department : 1 Secretary, 1 Deputy Secretary. Commerce Department : 1 Secretary and 1 Deputy Secretary. Industries and Labour Department : 1 Secretary and 1 Deputy Secretary. Legislative Department : 1 Secretary, 1 Joint Secretary and 1 Deputy Secretary. Foreign and Political Department : 1 Secretary. For the present position, see The Reserved Posts (Indian Civil Service) Rules, 1938. *Gazette of India*, pt. I, 17 December 1938.

many superior posts at the centre and by the addition to each provincial cadre of a definite reserve of seven per cent of the provincial superior posts for direct recruitment in order to provide for temporary posts, deputation proper and foreign service, whether under the Imperial or particular Provincial Government."[1] This system of staffing the higher secretariat is known as ' the rule of tenure ', the well-known system which was applied to the Central Secretariat in 1905 at the time of Lord Curzon. ' The main features of this system are, first, that the Government of India Secretariat should be staffed not by direct recruitment but by the importation of officers already serving in Provinces ; and, secondly, that there should be regular alternation between a tenure of office in the Central Secretariat and a tenure of office in a post in the Provinces.' The Llewellyn Smith Committee of 1919 approved this method of recruitment though they recognized ' the undoubted disadvantages which result from the . . . system under which almost all the responsible officers of a Department are mere birds of passage, and practically the whole of the permanent traditions of the Department are the exclusive possession of the office Establishment '.[2] The Wheeler Committee of 1935 which carefully considered this question in the light of altered conditions under Provincial Autonomy have also held this method of recruitment as sound.[3] The Government of India have recently declared themselves in favour of the continuance of ' the tenure system as the normal method of filling posts in the Central Secretariat '.[4]

The tenure of office under this system has been normally for a period of three years. In actual practice the three-year rule has not been strictly adhered to. Taking the figures for the period 1919-35, the Wheeler Committee calculated that

[1] *Wheeler Report*, par. 9. In the year 1935, 58 superior appointments in the Government of India were reserved for the Indian Civil Service and provision was made for that number in the Indian Civil Service cadres of the different Provinces in varying proportions. But the actual number of Indian Civil Service officers serving in the Government of India in that year was 96. This, of course, meant a larger indent on the Provinces than was theoretically provided for.

[2] *Report*, par. 72.

[3] *Report*, par. 18.

[4] Government of India Communique on the *Wheeler Report*. See the *Statesman*, 17 November 1937.

this rule was departed from to the extent of 32·4, 8·7, 13·6, and 10·4 per cent in the case of Secretaries, Joint Secretaries, Deputy Secretaries and Under-Secretaries respectively. It will be found that the violation of the rule is most noticeable in respect of the 'key' officers. On the other hand, it must be noted that the extension was for more than one year in the case of only three out of twelve Secretaries, and of four out of eight Deputy Secretaries, whose terms of office were extended. Only two extensions were for more than two years. The usual extension being thus for some months 'it can be said that in most cases the rule has been followed in the main in respect of particular appointments'.[1]

It is of particular interest to note that although the occupancy of any given post has, on the whole, approximated to a period of three years, the total experience in the Central Secretariat of a good many officers has been considerably longer.[2] The Committee found 'a distinct tendency to promote Joint Secretaries to be Secretaries, Deputy Secretaries to be Joint Secretaries and Under Secretaries to be Deputy Secretaries, also for officers to hold on to successive Secretariat posts in the same Department'.[3]

The tenure rule does not apply in the Foreign and Political Department. This Department has a cadre of its own called the Indian Political Service drawn largely from the Indian Civil Service. An officer joining this service is really lost to his Province. The Secretariat appointments in this Department are made out of this service.

Until 1935 the tenure rule did not apply also to the Legislative Department. In that year it was extended to this Department in respect of the Secretary and the Deputy

[1] *Wheeler Report*, par. 15.

[2] Thus, 'out of 21 officers holding tenure appointments in the Government of India Secretariat on 31 October 1935, one has had over 8 years' service at the Centre; one over 11; and one over 14 and one over 15 years'. During 1919-35 three officers passed from one Secretaryship to another; five from one Deputy Secretaryship to another, and two passed from a Joint-Secretaryship in one Department to a Secretaryship in another. Eleven officers changed from one Secretariat post to another in the same Department, and two officers successively held four posts in the same Department with little or no interval between them. Vide ibid., par. 16.

[3] ibid., par. 16.

Secretary.[1] The term of the Secretary was fixed at five years, extensible for a further period of five years. Considering the usual age at which appointment to a Secretaryship is made, this nearly amounts to an absence of tenure.[2] The tenure of the Deputy Secretary in the Legislative Department has been fixed at four years.

In view of its special circumstances, the Legislative Assembly Department is also outside the operation of the tenure system.

The Wheeler Committee held that a system of tenure extensible (for no special reason) at option was bad. They disapproved the practice of promotion from one post to another in the same Department. They recommended that the tenure of both Deputy and Under Secretaries should be three years, followed definitely by reversion to an administrative post. In the case of the non-specialized Departments the officer would ordinarily revert to the Province of origin. In the case of the specialized Departments (e.g. the Finance Department) an expert cadre was to be built up from among the officers showing a special aptitude, and the Secretariat officers would revert to kindred administrative Departments under the Central Government, instead of reverting to the Provinces.

Regarding Joint Secretaries and Secretaries, the two members of the Committee recommended that they should be appointed without a specified limit being placed on their tenure of these posts, while the chairman favoured a tenure of five years.[3]

The Government of India have adopted a compromise between these two views. They have decided to fix the tenure

[1] The Joint Secretary in the Legislative Department is not subject to the tenure system.

[2] During 1919-35 the average length of service, on appointment, of Secretaries and Joint Secretaries was 22 and 19 years respectively: the average in the case of the Defence Secretary was, however, 19½ years, and in that of Joint Secretaries in the Departments of Industry and Education, Health and Lands was 17 and 16 years respectively. The average for Secretaries in the period 1900-20 was 23 years. The average length of service on appointment in the case of Deputy and Under Secretaries in the period 1919-35, was 13⅓ and 6 years respectively. Vide *Wheeler Report*, pars. 23, 24.

[3] *Report*, pars. 21, 23, 24.

of a Secretary at five years, after which period 'he will be eligible for re-appointment for a further full period of five years. The question whether an officer will actually be re-appointed either to the same or to a different Secretaryship' will be 'decided in each case on consideration of public interest'.[1] The longer tenure will to some extent meet the need of continuity but no officer will have any claim to be re-appointed. They contemplate the gradual extinction of the posts of Joint Secretary, unless in any case there are special reasons to the contrary. Hence alteration of the present three years' tenure of these posts is not considered. The Legislative Assembly Department and the new Political Department are not considered, for the former is, truly speaking, no Secretariat Department, and the latter is outside the control of the Governor-General in Council. The question of the exact system to be applied to the External Affairs and the Legislative Departments is still under consideration.

The Government of India have accepted the Wheeler recommendation of three years' tenure for Under Secretaries. They have, however, decided upon a tenure of four years for Deputy Secretaries.

The Government of India are also in favour of the creation of an expert cadre for the specialized Departments, to be 'recruited from the Indian Civil Service and from the Central Services in proportions (to be settled later), due consideration being paid to the existing rights of members of these services. A certain proportion of the other posts in the Secretariat will be open to members of the Central Services'.[2]

In the lowest rank of the officers' grade come the Assistant Secretaries, who are permanent officers in the Department. The Committee of 1919 expected this class of officers to fill

[1] Government of India Communique on the *Wheeler Report*. Vide the *Statesman* of 17 November 1937.

[2] The Indian Civil Service element in the Central Services will be retained. This reverses the previous decision of the Government not to recruit Indian Civil Service officers in the Indian Audit and Accounts Service. For the conclusions of the Government of India on the *Wheeler Report*, vide their Communique published in the *Statesman* (Calcutta) of 17 November 1937. For the Finance and Commerce Department Secretariats expert cadre have since been established. See *Gazette of India*, pt. I, 4 February 1939.

an important role. They contemplated considerable increase in the number of these officers and recommended appointment partly by direct recruitment from outside and partly by promotion, strictly on merit, from the office, preferably of men still comparatively young. In fact, however, these officers have mostly been taken from the ministerial staff, except in the case of the Finance Department, which draws upon the Audit and Accounts Service. The Government of India have now decided to replace Assistant Secretaries as they retire by Under Secretaries drawn from the Indian Civil Service or from the Central Services.[1]

The Ministerial Service now consists of Superintendents, first division clerks (or assistants), second division clerks, and third division clerks.

Superintendents are appointed by selection from among the first division assistants.

First Division : 50 per cent of the vacancies are filled by promotion from the second division, and 50 per cent as a result of a combined competitive examination for the first and second divisions.

Second Division : All vacancies in this division are filled as a result of the competitive examination referred to above. In cases of exceptional merit the Departments may promote a clerk of the third division to the second. Such promotions are not allowed in more than one out of every five vacancies.

Third Division : This consists of typists and routine clerks and is entirely recruited by a separate competitive examination.

The Government of India propose to abolish the distinction between the first and the second division clerks and to grade them all as assistants. The Ministerial grade will then consist of superintendents and assistants forming the noting section, and the clerks at the bottom performing routine duties

[1] This was definitely not contemplated by the Secretariat Re-organization Committees of 1919 and 1935. The former Committee rather recommended the abolition of Under Secretaries. One result of this decision will be a still further increase of the already large Indian Civil Service element in the Central Secretariat. Vide Government of India Communique in the *Statesman* of 17 November 1937.

only. The assistants will, of course, be recruited by a much stiffer examination than that applicable to the others.[1]

The Public Service Commission holds the examinations and prepares lists of candidates in order of merit. The successful candidates are then posted to the various Departments by the Home Department, according to an accepted ratio of communal representation.

We next turn to the discussion of Secretariat procedure. The Llewellyn Smith Committee of 1919 calculated that roughly nine out of ten cases dealt with in any given Department came from outside and of these at least five originated in a Provincial Government. Naturally, the Departments developed 'a type of organization much more suited for criticism than for direct initiative'.[2]

The Reforms of 1919 must have considerably reduced the number of provincial references, 'and while the cases coming before the Central Government are still mainly initiated outside it, and in their practical bearing touch many aspects of provincial life, they tend more and more to be concerned with Departments and subjects under the direct administration of the Government of India'.[3]

This tendency will become decidedly stronger under Provincial Autonomy. The Central Government's part will

[1] Vide Government of India's Communique in the *Statesman* of 17 November 1937.

PAY OF DIFFERENT GRADES per mensem:

1. Secretary	Rs. 4,000.
2. Joint Secretary	Rs. 3,000. (N.B. Joint Secretary, Legislative Department, Rs. 3,000–100–4,000.)
3. Deputy Secretary	Grade pay in Senior time scale + S.P. Rs. 400, *per mensem*.
4. Under Secretary	Grade pay in Junior time scale + S.P. Rs. 300.
5. Assistant Secretary	Rs. 750–25–900.
6. Superintendent	Rs. 500–20–600.
7. Assistants	
(1st Division Clerks)	Rs. 140–10–280–10–310–15–400 (E.B. after 280).
8. Clerks (2nd Division)	
Men	Rs. 80–4–120–5–200 (E.B. after 125).
Women	Rs. 100/3–104/2–108/2–112/2–4–120–5–200 (E.B. after 125).
9. Clerks (3rd Division)	
Men	Rs. 60–2–80–3–125 (E.B. after 95).
Women	Rs. 100/4–104/4–108/4–112/4–116/4–120–5–125.
Stenographers	Rs. 125–5–180–10–300.

[2] *Report*, par. 53.

[3] *Wheeler Report*, p. 3.

obviously be primarily that of collaborator and co-ordinator rather than that of dictator in respect of the Provinces. The bulk of the work at the Centre will originate there. It does not, however, necessarily follow that most of the business of a Department will also have its origin within the Department itself. The increasing complexity of governmental problems and the greater activities of Government in the economic sphere will require closer collaboration among Departments. It may be assumed, therefore, that an appreciable number of cases dealt with in a Department will come to it from outside, that is, from the other Departments.

A case received from outside is first received and indexed in the receipt and issue branch of the Department, which is under a superintendent. All receipts (except those which the superintendent has authority to dispose of himself) are next submitted to a branch officer.[1] At this stage the officer concerned is expected to direct what precedents or references should be put up, or to dispose of the case himself or to suggest to his superior officers how it should be disposed of.[2]

When, as in most cases, the receipt is returned to the office, the file keeper passes it on to the relevant dealing assistant. Referencing, where necessary, and noting on the case are then done by the assistants, and sometimes by second division clerks. In more important cases the superintendent himself does the noting. The file next goes to an officer, either an Assistant Secretary or an Under Secretary. The Assistant Secretaries do not perform the same type of work in all the Departments. 'In the Home, Education, Health and Lands, and Legislative Departments, they have been employed mainly for the purpose of office supervision and in connexion with ministerial establishment cases. In the Finance, Commerce and Industry, and Labour Departments their primary duty is to note on cases.' Between the office and the Secretary

[1] A Branch Officer is either an Assistant Secretary, or an Under Secretary or a Deputy Secretary. Receipts are generally seen by the Assistant Secretary and in certain Departments also by the Under or Deputy Secretary.

[2] Except in a limited number of cases, it is not possible for these officers 'to dispose or make suggestions for disposing of these receipts or to give instructions to the office as to the scope of the note to be prepared and the extent to which they desire precedents or references to be put up.' See *Wheeler Report*, App. This Committee still thought that the practice should continue.

there is usually the intervention of one officer only, whether Deputy, Under or Assistant Secretary. In the Defence Department, however, all cases go through the Deputy Secretary to whom they are submitted by either an Under or Assistant Secretary. The usual practice is that an Assistant Secretary submits cases to a Deputy Secretary and an Under Secretary notes to the Secretary or Joint Secretary. The Deputy Secretary notes to the Secretary or Member.

A Joint Secretary has a definitely lower status and pay than the Secretary; he is employed to relieve the Secretary of the pressure of work. 'In practice the various branches are definitely divided between the Secretary and the Joint Secretary, though presumably the Secretary ordinarily deals with the most important work."[1]

The Secretary disposes of the less important cases himself and puts up the more important ones to the Member. The latter on his part uses his discretion as to whether he will pass orders himself or refer the case to the Governor-General. Certain cases must, however, be referred to the Governor-General.[2]

The Governor-General may himself dispose of the case or may direct its circulation and eventual submission to Council.

At the Council meeting a decision on the case is made. It then comes back to the Secretary, and thereafter travels back to the office for drafting, copying and issuing of the necessary orders. The case may, and most important cases do, require reference to another Department or to the Secretary of State or to Provincial Governments, in which event this other intermediate stage has to be gone through.

At each stage of its journey from the superintendent upwards a case may, at the discretion of the officer concerned, be referred higher up or finally disposed of. Cases which a superintendent may dispose of are necessarily of routine nature or of very little importance. An Assistant Secretary may dispose of slightly more important cases. In view of their usual recruitment at a comparatively advanced age from the Ministerial Service, these officers have necessarily been somewhat timid in deciding cases on their own responsibility. At

[1] *Wheeler Report*, par. 31.

[2] See p. 101.

each higher grade the scope of discretion is necessarily larger. Lest subordinate officers should exercise too much discretionary power it is provided that the Member and the Secretary should respectively be furnished periodically with the lists of cases which the Secretary or the other subordinate officers, as the case may be, decide on his or their own responsibility. It may be presumed that more cases are now decided without being referred to above than in the past. It is, however, difficult to say whether the Member or the Secretary have only really important cases referred to them.

A case affecting another Department has to be referred to that Department before it is circulated or discussed in Council and before any order is passed on it. The Committee of 1919 found that references to other Departments were often made unnecessarily. Besides, the method of reference was by the sending of the file to one Department after another, which caused unnecessary delay. The procedure has since been improved. Firstly, a good deal of such references on useless or minor matters no longer takes place. Secondly, personal discussion now plays a more important part in inter-Departmental relations. The amended Secretariat Instructions[1] provide that consultation with other Departments shall, wherever possible, be effected by personal interview between responsible officers of the Departments concerned, the result being recorded on the file by a note agreed between those officers. When a case is referred to and returned from another Department and a difference of opinion is disclosed, personal discussion invariably takes the place of further noting. When Members in charge of the Departments agree after personal discussion, the Secretaries meet and put up a joint note recording the decision.[2]

Circulation of cases is an important stage in the procedure. The Secretary of the Department concerned has to see that, except with the permission of the Governor-General, no case comes up for discussion in Council without having been

[1] See *Wheeler Report*, p. 81.

[2] The Wheeler Committee thought there was further scope for such personal consultation. Where it is necessary to consult more than one Department the reference is usually simultaneous instead of successive. This new rule is not, however, strictly observed. See *Report*, p. 82.

previously circulated. The former method was to circulate the file among the Members in order of seniority, each Member noting his opinion successively on the file. When this process was complete, the file returned to the originating Department, where the Secretary examined the notes and advised the Governor-General whether there was substantial unanimity, or whether there was such divergence of opinion as to require the case to go to Council. This procedure caused unnecessary delay and gave insufficient time to Members to study the case before the meeting of Council. The procedure has since been improved. Unless the Secretary or the Member-in-charge otherwise directs, printed copies of the notes and relevant papers are circulated simultaneously among the Governor-General and the Members at the time when the file is sent to the first Member. The case normally circulates, as previously, in order of seniority, and each Member notes his opinion on the case when it comes to him in due course. This change gives him time to study the case before he has to note on it.

A further modification has taken place recently. To-day the circulation of the file is unusual. All papers connected with Council cases are printed up and distributed among the Governor-General and all the Members of the Executive Council, but the files remain in the originating Departments. Only when a Member asks for a file is it sent to him. At present, circulation of files takes place in two cases : firstly, where it is believed that there will not be divergence of opinion and reference to Council may be obviated by sending the file around ; secondly, where a particular file is itself a Council case, for instance where disciplinary action against a particular person is recommended by the Public Service Commission. Obviously, the Members can make up their minds as to the merits of the recommendation only after going through the file.

8

THE GOVERNOR-GENERAL AND THE DEPARTMENTS

THE Secretary in each Department occupies a position of great responsibility and dignity. He corresponds to a Permanent Secretary in Whitehall. There are, however, points of difference between the two. In the first place, the Permanent Secretary in England holds his position until retirement or promotion to some higher office, while the Indian Secretary is, in theory, a temporary occupant of his office, leaving it after a definite term. But in practice, as already stated, he is not nowadays a mere bird of passage. Secondly, the English Permanent Secretary is Secretary of a particular Department, if not practically Secretary to the Minister in charge. He is usually appointed by the Minister concerned, with the approval of the Prime Minister. The Indian Secretary is not, in law, Secretary of any Department, or of any Member ; he is Secretary to the Government of India as a whole, and technically he can do the work of Secretary in all the Departments of Government. He is appointed, not by the Member in charge of the Department, but by the Governor-General, who would certainly give due consideration to the Member's opinion. Extension beyond the normal term can be, and is, given by the Governor-General alone. Thirdly, in England a Permanent Secretary does not see the Prime Minister about matters of importance in his Department unless the Prime Minister sends for him. In India the Secretary normally interviews the Governor-General once a week and discusses with him all important matters in his Department. Besides, he has, under the Rules of Business, the right of referring at his discretion any case at any stage for the Governor-General's orders. He is responsible for seeing that the rules are duly observed in his Department. He will be held responsible if he fails to bring to the Viceroy's notice a case of

real importance in his Department before it is disposed of. Fourthly, the Permanent Secretary does not attend meetings of the Cabinet, while the Secretary in India is always present at meetings of the Executive Council whenever any case relating to his Department is discussed. Lastly, the former is a Civil Servant in the strictest sense of the term. He is the official adviser of the Minister ; whatever his actual influence in the shaping of his Department's policy he does not, and cannot, defend it in Parliament. The Indian Secretary, on the other hand, is always nominated to either Chamber of the Legislature. He usually sits in the House of which his chief is not a Member and there expounds and defends the policy of the Department, and sometimes of the Government, answers questions addressed to his Department and, in short, plays the part of a Parliamentary Under Secretary.

The Secretary, therefore, occupies a ' key ' position in the Department, being in direct and intimate touch with the Member and the Viceroy on the one hand and the subordinate staff of the Department on the other. All important cases normally pass to the Governor-General or the Member through his hands, and all cases, whether put up by himself or some other officer, must come back to the Department through him. This enables the Secretary, if he will, to keep himself abreast of everything of importance that is happening in the Department.

The Secretary is not, however, the real official head of the Department in the sense in which his English prototype is. The Member in charge of the Department is practically a combination of Minister and Permanent Secretary. He is the official head of the Department. He decides minor cases himself and refers the cases of major importance to the Governor-General. In every case of disagreement with the Member, the Secretary is not obliged to take it to the Governor-General. He would do so only when the matter is of considerable importance, and that only after consultation with the Member. There can be no question of a Secretary getting his chief's order set aside behind his back. The Member can issue an order in the name of the Government of India even

without the concurrence of the Secretary.[1] The latter may, of course, take the matter to the Viceroy. The position of the Secretary *vis-à-vis* the Member is certainly fraught with potentialities of friction. In practice, the relation between the two is one of harmony, at least not of open friction. A prudent Secretary will rarely take a case to the Viceroy against his Member's wish. He would try to convince his chief by the cogency of his arguments and in a good many cases his point will carry conviction. Alternatively, he will accept the Member's view, while still doubting its wisdom and propriety; or a compromise may be accepted by both. If he wants to take some case to the Governor-General he will suggest to the Member that it is a case which deserves His Excellency's consideration. In most cases the Member will agree with the Secretary or will feel that nothing will be gained by refusing to submit it to the Viceroy.[2] Both the officials know the limitations of their own position.[3] As men of experience they realize that their views will carry much greater weight with the Viceroy and the Executive Council if they are in agreement, than otherwise.

The Governor-General is the political as well as administrative head of the Government of India. His relations with the various Departments are continuous as well as intimate. It is, no doubt, true that the office of the Governor-General, like any other office, is what its occupant chooses to make it and that his influence in the Government is a function of his ability and personality. There are, however, factors which make the position of the Governor-General one of inherent power and authority. He is the head of the Indian administration in the real sense of the term.[4] He is not only in direct and immediate charge of one of the most important

[1] Vide Evidence of Sir H. Risley (Home Secretary) before the Royal Commission on Decentralization in India, 1908. *Minutes of Evidence*, vol. X, Q.45532, 45536, 45537.

[2] Because the Secretary can still take it to him.

[3] A Secretary who frequently differs openly from his chief stands to lose rather than gain, while a Member does not enjoy the prospect of frequent disagreement with the Secretary.

[4] cf. Sir Basil Blackett: [The Governor-General] 'is the administrative head of every Department of the Central Government; and as such he has the indubitable right, if he thinks fit, to take part personally in any administrative problem'. *Legislative Assembly Debates*, 1927, vol. IV, p. 3775.

Departments, but he is also vitally associated with all other Departments and his influence on them may be profound.

All Governors-General have, without exception, been the Member in charge of the Foreign and Political Department.[1] This Department is divided into two branches—the Foreign Branch, conducting all business connected with foreign affairs and relations with the trans-border tribes; and the Political Branch, dealing with matters concerning the Indian States. This Department has two Secretaries of equal status, the Foreign Secretary and the Political Secretary. Each of them is the highest official adviser to the Governor-General in respect of his own branch. As in other Departments, the important cases have to be submitted by the Department for his orders. He is, in respect of this Department, in exactly the same theoretical position as any Member in charge of any other Department. But some differences must also be noticed. Members of the Executive Council are bound to refer all cases of major importance to the Governor-General, but the latter has not to submit cases arising in his Department to any other individual. It necessarily follows that the Governor-General has a much greater latitude in the disposal of cases in his own Department than the Member in charge of any other Department has. Secondly, the Secretary in any other Department is, in theory, independent of the Member and has the undisputed right of taking any case to the Governor-General over the head of his chief. The Secretaries in the Foreign and Political Department, obviously, do not have any such right or independence as against the Viceroy. In view of the multifarious duties that the Viceroy has to perform and the volume and complexity of the work of the Department, the Foreign and Political Secretaries have, however, in practice a much greater authority and influence in the administration of their charges than the other Secretaries.[2] Besides, the Governor-General is not a Member of either Chamber of the Legislature. The

[1] With effect from 1 April 1937, however, the Political Department has been placed under the Crown Representative. But as the Governor-General is also the Crown Representative, and is bound to be so in practice, the change does not affect his position. Indeed, it has considerably strengthened his position *vis-à-vis* his colleagues.

[2] The Foreign Secretaryship used to be regarded as the blue ribbon of the Service.

two Secretaries are, therefore, the principal spokesmen of this Department in the Legislature, while the Members themselves are the chief representatives of their Departments in the Legislative Chambers.

'But the Viceroy,' says Curzon, 'though he is directly responsible for this one Department, is scarcely less responsible for the remainder.'[1] Indeed, before the portfolio system was adopted, he was the initiator of business in all Departments. Thereafter, the initiative in other Departments largely passed to the Members. But under the Rules of Business and the accepted practice his share is still considerable, and in crucial matters decisive. A large amount of business is disposed of in the Departments without the Governor-General's knowledge or approval; but no matter of real importance may escape his notice. Certain classes of cases in the various Departments must be taken to him for orders, namely:

(*a*) all cases where there is a difference of opinion with some other Department or Departments;

(*b*) all cases in which it is sought to overrule a Provincial Government;[2] and

(*c*) all cases which require reference to the Secretary of State.

Besides, a Member is required to refer to the Governor-General all matters which, in his judgement, are of major importance. In this the Member has a certain measure of elasticity. One Member may refer to the Governor-General cases which another will feel justified in disposing of himself without unnecessarily troubling His Excellency. Similarly, some Viceroy may welcome or desire reference to him of matters which another would be glad to leave in the hands of his colleagues. Much indeed depends upon the interests and qualifications as well as the preoccupations of the Viceroy.

[1] Curzon, op. cit., vol. II, p. 113. Nowadays the Governor-General has three other portfolios. Vide pp. 84-5.

[2] But (i) cases in which a suggestion only is made to a Provincial Government, and (ii) cases in which the proposals of a Provincial Government contravene standing orders or accepted principles, and the reply of the Government of India merely refers to such orders or principles, are not submitted to the Governor-General. Vide Royal Commission on Decentralization, 1908. *Minutes of Evidence*, vol. X, Q.45887 (Sir H. Risley).

Each Department also tends to develop a more or less elastic practice in this regard. Granting all this, there are numerous cases which clearly must come up to the Viceroy. The Rules, as we have seen, are so designed that all important matters have necessarily to go to the Governor-General. As the Government of India, after a careful review of the Rules, observed : 'The Statutory Rules framed under the Government of India Act require that every case which in the opinion of the Member in charge of the Department to which the subject belongs is of major importance shall be submitted by him to the Governor-General with the orders proposed by him. An additional safeguard is provided through the position occupied by the Secretaries to the Government of India, who, while they are charged with the duty of seeing that the Rules of Business are duly observed, are at the same time given a status independent of the Members, with the right of referring at their discretion any case at any stage for the Governor-General's orders.'[1] Besides, both the Member[2] and the Secretary have to meet the Governor-General at least once a week. At these interviews the Viceroy may ask about important matters if they have not already been placed before him. A case of major importance can, therefore, hardly escape His Excellency's vigilance, unless it is assumed that an identical error of judgement has been committed by the Member as well as the Secretary by failing to bring it to the Governor-General's notice. A Member who fails, either intentionally or by an error of judgement, to refer major cases to the Viceroy will do so at his own risk. He will be censured or in extreme cases lose his job, especially when his independent

[1] Communique of the Government of India, Department of Industries, dated 28 August 1921. See the *Statesman* (Calcutta), 30 August 1921.

[2] Hunter gives the following routine normally followed by Mayo :

Monday	Foreign Secretary	4 p.m.
Tuesday	Legislative Council	11 a.m.
Wednesday	Home Secretary	11 a.m.
	Public Works Secretary	12 noon.
	Agricultural Secretary	1 p.m.
Thursday	Foreign Secretary	10.15 a.m.
	Executive Council	11 a.m.
Friday	Financial Secretary	11 a.m.
	Military Secretary	12 noon.

It appears that there were no regular interviews with Members as now. See *Life of Earl of Mayo*, vol. I, p. 202.

action miscarries. The withdrawal of the prosecution in the Indian Munitions Board fraud case by Sir Thomas Holland without reference to the Governor-General is a case in point.[1] His action, in view of the public outcry against it, was openly disowned and condemned by the Governor-General in Council, his failure to submit the matter to the Governor-General was dubbed as an error of judgement, he regretted his 'omission to invite the attention of the Governor-General . . . or to take his instructions before issuing orders', and ended by almost immediate resignation. Sir Thomas acted with the approval of two of his colleagues, but this did not save him. If, on the other hand, he had acted in consultation with the Viceroy, it may be presumed that the consequences would have been different. It may be noted that the Secretary of the Department had, by special order, nothing to do with the case.

In fact, under the Indian procedure, it is believed that many cases are taken to the Governor-General which could, without any detriment to the public interest, be dealt with in the Department. This involves delay as well as unnecessary encroachment upon the Viceroy's time and energy, which are none too plentiful. A Member of the Executive Council has not the independence that a Minister in England has with regard to cases concerning his own Department. There is, however, reason to believe that a Member exercises more discretion nowadays than in pre-War times.[2]

How far the Governor-General brings his own mind to bear upon the cases submitted to him is an extremely difficult question to answer. The impact of the Governor-General on the Departments is a variable quantity. Lord Curzon was undoubtedly the Viceroy who took the largest personal share

[1] See pp. 125-7.

[2] On the position of a Member of the Executive Council, Sir Sankaran Nair, an ex-Member, said: 'You cannot imagine a person, for instance, who is more anxious to do certain things to advance Indian interests, but I know how helpless I was as the head of the Department . . .' Continuing, he said, 'The Secretary, if he differed from the Member, might take the file to the Viceroy and explain it to him. He has got the advantage of explaining to him first, which I have not. But if the Viceroy differs from me, he cannot overrule me. He can only place it before the Council for the opinion of the other Members. . . . The Viceroy has no power over me; he has to refer the question to the Council, and the Council alone can overrule me.' Report of the Joint Select Committee on the Government of India Bill, 1919, *Minutes of Evidence*, Q.9546, 9548.

in the administration of the various Departments. He was, however, a man of really exceptional abilities and wonderful industry. No other Viceroy before or after him has attempted to do all that he did. All the Departments of Government very much felt the impact of his personality.[1] If Lord Curzon stands in one extreme, all by himself, a recent example of the other extreme is believed to have been Lord Willingdon. He is said to have practised the principle of delegation or non-interference too far. During his time the Departments enjoyed the height of independence. Lord Willingdon was never reputed to be a great administrator; neither did he possess expert knowledge of any particular branch of government. Besides, he came to office at the extremely old age of 65.[2] And his term synchronized with great political and economic upheavals.

Of all recent Viceroys, Lord Reading exercised the largest influence on the Departments. In many respects his case was unique. He came out to India with the highest reputation. Unlike most Viceroys he was himself well versed in matters like currency, finance, commerce, industry and, not least of all, law. The Departments dealing with these subjects naturally felt the weight of his authority.

Quite clearly, no Viceroy can effectively supervise the work of all Departments. Being himself responsible for a most arduous Department and with multifarious calls on him, a Viceroy can hardly look into the affairs of the Departments. There are some Departments which necessarily come more under his purview than others. For instance, the Home Department, which is responsible, among other things, for oversight of internal politics, has cases frequently arising which require the careful consideration of the Viceroy, especially in

[1] The work of Government today is wider and far more complex than in pre-war days. Moreover, a modern Viceroy has to study quite carefully the trend of public opinion in India on policy and administration. Even a Curzon could not, under modern conditions, have the same grip over Departments as was possible in pre-war days. The Members would strongly resent too much interference by the Viceroy in the work of their Departments.

[2] As he himself said, 'The impression which has been very vividly forced upon me during the few short weeks I have been engaged in my duties here is that the work a Viceroy has to do is much too heavy for a gentleman of my mature years.' Speech at Chelmsford Club, Simla, on 27 June 1931. See the *Statesman* of 28 June 1931.

times of political turmoil which has now become a chronic feature of Indian politics.[1] The Defence Department, both by its inherent importance and by reason of its close relation to the Foreign Department, must inevitably receive the Viceroy's particular attention. Most of the Viceroys are laymen in financial matters and feel little disposed to interfere in the Finance Department's affairs.

The personal inclinations of the Viceroy, as well as the state of public opinion on any question at any given time, usually determine the extent and intensity of the Viceroy's personal interest in the work of particular Departments. A matter which ordinarily a Governor-General does not interfere with may for some reason or other loom large in the public eye and become the subject of close observation by him.

Politics has been the principal actor on the Indian stage during the post-war period, and political questions have taken a disproportionately large share of the Viceroy's time and thought. As Lord Reading admitted, because of the constitutional question and political question he or the other Viceroys could not apply their mind to the amelioration of the poorer people's condition.[2] Incidentally, a constitution which gives rise to such a result must be regarded as utterly unsound.

While it is true that the active influence of the Viceroy on many Departments is not considerable, his indirect or moral influence is immense. The incoming of a new Viceroy may often change the outlook of Departments. Subjects in which he is or is believed to be interested are often very much accelerated.[3]

[1] In 1907-8, 21·7 per cent of the cases dealt with in the Home Department required submission to the Viceroy. Vide *Decentralization Commission Report*, par. 19.

[2] Speech in the House of Lords on the motion for the appointment of a Joint Select Committee on the White Paper of 1933. Vide *House of Lords Debates*, 6 April 1933, vol. 87, col. 429.

[3] It is one of the duties of the Private Secretary to know what things the Viceroy is specially interested in, and to get these quickly done by telling the Member and the Secretary of His Excellency's interest therein. A more drastic method is for the Viceroy to direct that a certain thing should be done as quickly as possible, and it is almost certain that the thing will be seen through with the utmost dispatch. Lord Reading, for instance, became personally interested in the Indian Church Measure, and the matter was so speeded up that it was possible to enact it early in Lord Irwin's régime.

9

THE EXECUTIVE COUNCIL—FUNCTIONS AND PROCEDURE

BEFORE the adoption of the portfolio system all business was in theory, and most business was in practice, disposed of by the Governor-General in Council. The new system was introduced primarily with a view to effecting a reduction in the number of references to the Executive Council, by enabling minor cases to be decided in the Department, and more important cases between the Member and the Governor-General, leaving really important cases for decision in Council. Although a considerable reduction was undoubtedly secured, the cases that continued to come up before the Council were not all of real importance. Indeed, in the beginning, a much wider range of business used to come up before the Executive Council than comes up before the British Cabinet or even before the Executive Council nowadays.

Cases which are decided in Council fall into two classes : (1) cases which must be, or invariably are, decided in Council, and (2) cases which the Governor-General, in his discretion, thinks fit to refer to the Council.

1. The first consists of the following four categories :

(*a*) cases in which there is difference between two or more Departments ;

(*b*) cases in which the Governor-General differs from a Department ;

(*c*) cases in which it is proposed to legislate ; and

(*d*) cases in which it is proposed to send a dispatch to the Secretary of State.

(*a*) In the event of disagreement between the Member in charge of the originating Department and another Member the case has to be put up before the Governor-General, who almost invariably refers it to the Executive Council, unless,

of course, he is able to bring about an agreement. He may decide the case himself, but that is seldom done. In this respect the Finance Department has a unique position. In case of difference between this Department and any other Department the Finance Member has the right of compelling reference of the matter to the Executive Council. Moreover, should he dissent from the view of the majority in Council, he can hold up action until reference is made to the Secretary of State and his approval obtained.

The Government of India is a corporate unity in a sense in which the Departments in England are not. This does not, however, imply the absence of departmentalism. As elsewhere, the Departments in India are prone to look at problems coming up before them from a narrow departmental point of view. Departments often become involved in internecine and unending conflicts with one another. Some of these conflicts are got over by personal discussion between the Members concerned, some by the mediation of the Governor-General, and the rest are settled in Council.

(*b*) Cases in which the Governor-General overrules the Member in charge must be referred to the Executive Council if the latter so desires. Where, however, the Member acquiesces, no such reference is necessary unless the Governor-General on his own motion takes the matter to the Council, as he may do in all cases.

(*c*) A proposal for legislation is first originated in the Department concerned. It is, of course, referred to any other Department which may be affected. If the Member in charge of the originating Department is in favour of the legislation proposed, he has to submit it to the Governor-General. The relevant papers are then circulated among all the Members and the case is afterwards discussed in Council. The Governor-General may dispense with circulation, in which event the case goes to Council direct. If the Council approves the proposal it is sent with all connected papers to the Legislative Department for the drafting of a Bill on the lines approved. The same procedure, *mutatis mutandis*, applied to the making of Regulations by the Governor-General in Council. The procedure in respect of Ordinances follows almost similar lines.

The Committee of 1919 found that in many cases the practice was that the Executive Council approved the principle of legislation but did not see the Bill after it had been drafted. They suggested some change in procedure. Accordingly, under the present practice, a legislative proposal normally comes up to the Council after it has been embodied into a Bill. In important matters[1] a reference is usually made to Council much earlier. It is asked to approve the principle or principles involved before a Bill is drafted. The Bill as finally prepared is presented to the Council for its approval.

(*d*) Dispatches to the Secretary of State are usually considered in Council. If the subject matter of a dispatch has been previously discussed in Council, a draft dispatch may be circulated among the Members, thereby avoiding further reference to Council. This requirement about dispatches may be, and sometimes is, circumvented by the use of telegrams instead.

2. Cases referred to the Executive Council at the Governor-General's option.

In respect of cases other than those mentioned above the Governor-General has to determine whether reference to Council is necessary. The Rules provide that where the Governor-General concurs with the Member it is for him to decide 'whether and when a case shall be brought before a meeting of Council'. It was represented to the Committee of 1919 that cases were sometimes referred to the Council which could properly be settled by departmental methods. It was suggested that the above rule as interpreted in practice created an undue presumption in favour of circulating cases to Council unless there was a reason to the contrary. It was contended that 'the presumption should be in the other direction, viz. the settlement by consent between the Governor-General and the Department concerned of all questions (other than those specified above) which do not raise large issues of policy'. The Committee were of opinion that reference to

[1] It primarily depends on the Member and the Secretary of the administrative Department concerned whether an early reference to Council is made. Where the subject matter is really important or controversial, the Department will find it convenient to take the opinion of the Council before proceeding too far with the preparation of the Bill.

Council should be made ' in really important cases '. Accordingly, they recommended that the Rule should be amended so as to read thus : ' The Governor-General, if he concurs with the Member in charge of the Department to which the subject belongs, will make the necessary order unless he considers it necessary to bring the case before a meeting of Council, in which event he will determine when the case shall be so brought before Council.'[1] The Rule does not appear to have been formally amended.

It often happens that although the Governor-General agrees with the Member, he refers the case to Council, either because it raises a matter of policy,[2] or because, for some reason or other, he thinks that the views of the Council on the question ought to be ascertained. The responsibility of the Governor-General in Council is collective ; orders of the Government are issued in the name of the Governor-General in Council ; all Members of the Council are expected to defend and justify the policy and administrative actions of the Government, irrespective of the Department in which they originate. They ought, therefore, to share in the decisions regarding such policy or action. Possible misunderstandings among Members must also be avoided. The Members do not belong to the same political party as the Members of the Cabinet in England do, and consequently they do not have a common and clearly defined policy. They are drawn from different races, communities and interests. The Executive Council is a composite and not a homogeneous body. All this makes it doubly necessary for the Governor-General to ensure that all important decisions really reflect the collective views of the Executive Council.[3] In practice, much, of course, depends on the personality and temperament of the person who occupies the Governor-General's office.

[1] *Report*, par. 83. This suggestion, if accepted, would reduce the number of references to the Executive Council, but would not enable the disposal of a larger number of cases in the Department itself.

[2] Where the Governor-General thinks that a case involves issues of grave importance, he has to refer it to the Council.

[3] As Hunter, writing about Lord Mayo, observed, the Viceroy ' had to see, as his orders ran in the name of the Governor-General in Council, that they fairly represented the collective views of his Government.' *Life of Earl of Mayo*, vol. 1, p. 193.

These rules about reference to the Executive Council apply, *mutatis mutandis*, to cases arising in the Governor-General's Departments as well. Obviously, there does not arise in his Departments any case falling under category 1 (*b*), mentioned above. But where he differs from another Member, say, the Finance Member, or where it is proposed to legislate in any of his Departments, or where a dispatch to the Secretary of State is to be sent, the Council procedure has to be resorted to. Similarly, he has to refer to Council all cases of real importance in his Departments. Thus the Nabha and Indore cases were placed before the Executive Council by Lord Reading, and the deposition of the Maharaja of Nabha as well as the abdication of the Maharaja of Indore followed decisions in the Executive Council. The Princes' Protection Bill had to go through the same process as any other Government Bill. The Waziristan question in Lord Reading's time occupied several meetings of the Executive Council. It is understood that questions regarding salutes, dynastic matters or depositions in respect of the Indian States were always discussed and decided in Council.[1]

There is no specific rule requiring the submission of the Budget to the Executive Council. In view of its supreme importance, however, it is never presented to the Legislature without the previous approval of the Council. The Indian financial year, like that of England, commences on the 1st of April. The machinery is, however, set in motion much earlier. Generally in September of the previous year the spending Departments are asked to submit their estimates for the ensuing financial year. At this stage frequent discussions take place between the officials of the Finance Department and those of the other Departments. In important matters the Finance Member has to discuss points at issue with the Members in

[1] Regarding the position of the Executive Council *vis-à-vis* the Indian States, Lord Reading said, 'Hitherto the constitutional position has been that these matters were dealt with by the Governor-General in Council; and in practice that has been so, save that the Viceroy, who acts as the member . . . on these questions generally referred to as political, deals with them, save in matters of major importance, when, certainly in my practice, they were taken to the Council and dealt with by the Council with the Viceroy presiding.' See Lord Reading's speech at the Federal Structure Sub-Committee on 5 January 1931. See *Proceedings*, p. 162.

charge of the other Departments. Like the English Chancellor of the Exchequer, he may decline to provide funds for proposals on which other Departments are keen. These proposals often involve the determination of policy and are therefore discussed in Council. Proposals for taxation are initiated and scrutinized in the Finance Department. The Council may in some cases express its general opinion on measures of taxation. Finally the Budget, that is estimates of expenditure as well as proposals of taxation, is presented to the Council by the Finance Member. This is done usually at the first meeting of the Executive Council after the Christmas recess. After the Budget has been approved by the Executive Council, it is telegraphed at length to the Secretary of State whose approval is generally communicated about the middle of February.

The matters which have so far been considered are statutory powers of the Governor-General in Council, and decisions thereon, by whomsoever made, must run in the name of the Governor-General in Council. There are a number of very important powers, almost autocratic in nature, which are clearly and definitely vested in the Governor-General as such, as distinct from the Governor-General in Council: for example, the power of certifying Bills, issuing Ordinances, or extending the life of the Indian Legislature. All these are strictly individual and personal powers of the Governor-General. He need not consult his Council before exercising any of these powers, nor has the Council the right to offer any advice. On numerous occasions this distinction between the powers of the Governor-General and of the Governor-General in Council has been emphatically pointed out by responsible members of the Government. For instance, speaking on Mr (later Sir P.) Ginwalla's Resolution in favour of the abolition of the distinction between votable and non-votable items in the Budget, the Finance Member, Sir Malcolm (now Lord) Hailey said, 'If the power rests with the Governor-General, then it is a personal and a final power, and it follows (and this is a point which I wish to make clear, from the first, to this House) that it is not the function of the Governor-General in Council to make recommendations to the Governor-General, in regard to the exercise of his personal power, nor can they in any way seek to sway

his decision.' Further on, he said, 'I must still maintain this position, that it is not my intention nor that of any of my Honourable colleagues to advise the Governor-General in a matter in which his decision is by law personal and individual.'[1]

Sir William Vincent (Home Member), in arguing that a motion for adjournment to discuss the proposed use of the certification-power, under Sec. 67B, in respect of the Princes' Protection Bill, was out of order, said, 'It is the action of the Governor-General. It is for you, Sir, to consider whether the Governor-General in Council can make any recommendation to the Governor-General and can in any way question his conduct or his action.'[2] Upholding Sir William's point of order, Sir F. Whyte, President of the Legislative Assembly, said, 'The Statute invests the Governor-General with a definite power to exercise, under his own discretion; it does not invest the Governor-General in Council with any power of interference or advice in this particular matter. This House cannot move and carry a Resolution inviting the Governor-General in Council to invade the province of the Governor-General.'[3] Speaking on a Resolution for the amendment of Sec. 67B, Sir M. Hailey described the Governor-General's certification-power as 'a burden which he has to bear alone and does not even share with his Council'.[4]

In an address to the Indian Legislature, Lord Reading, referring to his certification of the Salt Tax, said, 'The responsibility was grave and the decision rested with me alone.'[5] Sir H. Smith, Secretary, Legislative Department, on one occasion solemnly assured the Legislative Assembly 'that the Governor-General in Council cannot, will not, and in fact, dare not, attempt to control or sway the Governor-General's discretion as to the exercise of his personal statutory powers'.[6] Referring to the Governor-General's sanction for the introduction of Sir P. Thakurdas' Ratio Bills, Sir Basil Blackett (Finance Member) observed, 'The question of leave to introduce a

[1] *Legislative Assembly Debates* (1922), vol. II, pt. I, pp. 1968, 1983.
[2] *L.A.D.* (1922), vol. III, pt. I, p. 858.
[3] *L.A.D.* (1922), vol. III, pt. I, pp. 859-60.
[4] *L.A.D.* (1923), vol. III, pt. IV, p. 4309.
[5] *L.A.D.* (1923), vol. III, pt. VII, p. 5097.
[6] *L.A.D.* (1924), vol. IV, pt. III, p. 1983.

Bill of this sort is a matter which is entirely in the hands of the Governor-General, not in the hands of the Governor-General in Council.'[1]

'These powers . . .', said Sir James Crerar (Home Member) on one occasion, 'are very expressly and very completely vested in the Governor-General himself. . . . The Government of India have no share whatever in those powers. They have no right even to advise in the exercise of those powers.'[2] Pressed to state whether the life of the Assembly would be extended, Sir B. L. Mitter (Law Member) repeatedly gave the answer, 'This is not the concern of the Government of India. It is the concern of the Governor-General (alone).'[3]

The quotations given above are most likely to give one the impression that in the exercise of his wide discretionary powers[4] the Governor-General acts alone, unaided and unchecked by his colleagues, and that in the use of his extraordinary powers he becomes an entity removed from, and uninfluenced by, the seven members of his Council who observe him, in helpless resignation and with folded hands, from a distance. As a strict legal interpretation of the nature of such powers, these opinions are unexceptionable. For the law clearly and unambiguously vests these powers in the Governor-General alone. There is, in law, none to share these powers with him. As an exposition of the actual constitutional practice, these views are wholly distorted. None could be more conscious of the practical unreality of these views than those who enunciated them. For, in practice, the Governor-General cannot and does not act in a vacuum. Whether it is the certification of a Bill, the promulgation of an Ordinance, the vetoing of a Bill or sanctioning its introduction, or the like, the materials for action come up to him through the regular channels of the respective Departments with the Members' opinions thereon. In no case, therefore, does the Governor-General act without having before him, and giving proper consideration to, the opinion, at any rate, of the Department

[1] *L.A.D.*, vol. V, pt. I, p. 175.
[2] *L.A.D.*, 1929, vol. I, p. 791.
[3] *L.A.D.*, 1933, vol. VIII, p. 2051.
[4] For which see ch. 3.

primarily concerned. In important cases he invariably consults the entire Council. Thus Lord Reading never exercised his extraordinary personal powers without previous discussion of the subject matter in his Council. The certification of the Princes' Protection Bill, 1922,[1] and of the Finance Acts of 1923 and 1924, the promulgation of the Malabar Ordinances of 1921[2] and the Bengal Ordinance of 1924, were all preceded by a thorough discussion in Council. Not only did he put these matters before his Council, but on all such occasions his action was in conformity with the opinions of his Executive Council or a majority of its members. His successors have not deviated from this practice.[3]

It is hardly difficult to understand why the Governor-General should consult his colleagues. The exercise of many of these powers involves very grave responsibility and sometimes far-reaching consequences. A prudent man will naturally ascertain the views of experienced colleagues before taking any action, and a discussion in Council is, therefore, a most normal preliminary. There is another very weighty consideration. While it is clearly true that the Governor-General is responsible for the exercise of these powers, it is equally undeniable that the position of his colleagues may be, and often is, profoundly affected by the action that he takes. The Government is an organic whole. Efficient and harmonious conduct of Governmental affairs will become well-nigh impossible if such grave actions are taken by the Governor-General without consultation with, and the advice of, his Council. In this connexion two points must, however, be noted. In the first place, when the Governor-General makes such a reference to the Executive

[1] In a dispatch to the Secretary of State, dated 12 October 1922, Lord Reading stated, *inter alia*, 'after discussing the situation at a Council meeting . . . I decided that I must make use of the special powers vested in the Governor-General (in respect of the Princes' Protection Bill).' Par. 13.

[2] Vide *Proceedings of the Federal Structure Committee of the First Round Table Conference*, p. 168. (H.M. Stationery Office.)

[3] It is believed, however, that the first Currency Ordinance of 1931 was issued by Lord Willingdon without consultation with his Council. That action was necessitated by the exceptional circumstances of the case. Sir George Schuster, the Finance Member, learnt from Reuter's telegram about the suspension of the Gold Standard in England on the 21st September 1931. He almost immediately hurried to the Governor-General and had the Ordinance suspending the Gold Standard Act of 1927 signed by Lord Willingdon, so that he might be ready with this measure just before the opening of the Exchanges.

Council, no vote is taken and no order of Council is recorded. The reason is that it does not form part of the formal business of the Council. Secondly, the Governor-General may or may not abide by the opinion of the Executive Council. In most cases he does accept their advice. There may be occasions when the Governor-General says, 'Look here, gentlemen, the responsibility in this matter is mine, and I am afraid I cannot accept your advice.' Such occasions are very rare indeed. Even so, it is more probable that the Governor-General will decline to exercise a special power when so desired by his Council than that he will use this power against their advice. Besides, there are certain matters which the Governor-General never brings before the Council. For instance, he does not submit his speeches for the Indian Legislature to the Executive Council for approval, nor does he consult the Council in respect of the grant of honours or the exercise of patronage. In regard to assent to Bills or the exercise of the power of pardon, the Council is not normally consulted. But in exceptional circumstances the Governor-General consults the Council even in these matters. Thus Lord Irwin's rejection of the petition for mercy on behalf of Bhagat Singh is believed to have been decided upon after a full discussion in Council.[1]

The Executive Council meets at such places as the Governor-General in Council appoints.[2] Actually it meets at Delhi and Simla and during Christmas time in Calcutta. The Governor-General presides at meetings of the Council. He has to appoint a Vice-President of his Executive Council from among its Members (other than the Commander-in-Chief). In the absence of the Governor-General the Vice-President presides; if he also is absent the senior Member, other than the Commander-in-Chief, present at the meeting, presides. The person presiding has the same power as the Governor-General would have, if present.[3]

[1] For the facts of the case, see pp. 229-30, post.

[2] Sec. 39 (1) of Government of India Act, continued in force by Sec. 317 (1) of the Act of 1935. In practice, the Governor-General tells the Council at its last meeting, say, in Simla, that it will next assemble in Delhi. No formal decision in Council is taken.

[3] No decision of the Council made in the Governor-General's absence is valid without his signature, if he is at the time of the meeting resident at the place and is not incapacitated by indisposition to sign such act of the Council.

At any meeting of the Executive Council the Governor-General or the person presiding and one member of the Council (other than the Commander-in-Chief) forms a quorum sufficient for the exercise of all the functions of the Governor-General in Council.[1]

The Executive Council normally meets once a week[2] except when the Governor-General is away on tour, and sometimes oftener. Such periodical meetings of the Council are not enjoined by the Act. The Rules of Business, until after the war, had also no provision on this point. Under the present rules the Governor-General has ordinarily to summon a meeting of Council once a week. Although the Act contemplates meetings of Council during the absence of the Governor-General, say, on tour, there is no special provision thereon in the Rules of Business. As the Committee of 1919 observed : 'The present practice during the absence of the Governor-General on tour is to hold informal meetings of such Members of Council as are available at headquarters but such meetings are not of course meetings of Council within the meaning of the Rules and they cannot take binding decisions.'[3] This resulted in appreciable delay in the disposal of business and the Committee suggested suitable amendment of the Rules. Their suggestion was not acted upon by the Government, for they did not propose 'to introduce any constitutional innovation, involving any formal delegation of the Governor-General's powers '.[4]

In recent years, however, formal meetings of the Executive Council have been held in the absence of the Governor-General. Ordinarily, the Governor-General is not long separated from his Council, so that occasions for meetings in his absence rarely arise. During the régime of Lord Willingdon, when various matters connected with constitutional reforms

[1] It is, therefore, quite clear that the Governor-General and the Commander-in-Chief cannot constitute a valid meeting of the Council.

[2] Ordinarily, it meets on Friday mornings at ten o'clock. Before the introduction of the portfolio system it was not unusual for the Council to meet two or three times a week.

[3] *Report*, par. 89. The result was merely reported to the Governor-General.

[4] Resolution of the Government of India on the Report of the Secretariat Reorganization Committee of 1919. See *Gazette of India*, 18 September 1920. The effect of this was to keep the full control of the Council business in the hands of the Governor-General.

were constantly cropping up, frequent meetings of the Council, sometimes four or five a week, were often held. Usually, important matters are not disposed of in the absence of the Governor-General. But if there is an urgent matter, the Vice-President summons the Council and the decision is a formal decision of the Governor-General in Council.

Meetings of Council are convened by the Governor-General. Notices of such meetings are issued under his direction to all Members in or near the place of meeting.

Until quite recently, there were no formal agenda for meetings of Council. The Governor-General is the only person who can order circulation of cases and direct their reference to Council. It is he alone who decides what particular cases will be taken up at a given meeting and in what order they will be discussed.

Council cases are usually circulated,[1] though of course the Governor-General may refer a case to Council direct. After the process of circulation and noting by Members is complete, the case goes back to the Secretary in the initiating Department who collates the opinions and advises the Governor-General whether there is substantial unanimity so as to render consideration in Council unnecessary. If the case is referred to Council, the relevant papers are printed and issued to the Members and the Viceroy at least a day or two before the meeting of Council.

Meetings of the Executive Council are private and strictly confidential, and are held behind closed doors. There are no outsiders present, except the Secretary of the Department concerned, and, for the last few years, the Private Secretary to the Viceroy and the Secretary to the Executive Council. The first Lord Minto described the Council procedure in his time as follows : ' The Secretaries attend at Council, each Department in its turn, with its mountain of bundles. The Secretary reads, or often states shortly, the substance of each paper, and the order is given on the spot. We are enabled to do this by having read these bundles at home. . . . The Secretaries

[1] Circulation serves two useful purposes : (i) Members get an opportunity to study cases before these are discussed in Council ; (ii) consideration in Council of some cases may be avoided when the opinions of Members are found substantially unanimous.

reduce all our orders into minutes of Council, letters, instructions, etc. . . . We hold two Councils a week—Monday and Friday. We meet at ten and sit till three or four . . .'[1]

Until quite recent years, the procedure in Council was as follows. When a case came up for consideration, the Secretary of the Department to which it belonged was summoned to the Council.[2] At the Governor-General's instance the case was opened by the Secretary, who briefly stated the point or points on which the Council's decision was sought. Sometimes he narrated the full history of the case and gave the gist of the opinions of Members who might have noted on it. He took no further part in its discussion unless, as often happened, he was asked for information or explanation on some specific points. Thereafter, the Governor-General called upon the Member in charge of the Department to make his own comments on the case. It was then discussed round the table. When the Council finally came to a decision on the case, the Secretary had to take it down as an order of Council and read it out to the Council. After the draft order was approved by the Council, it was initialled by the Governor-General and placed with the notes on the case. The Secretary took back the order of Council to his Department and saw to its execution in the manner appropriate to the case.[3]

The amount of discussion on a case naturally depends upon the nature of the subject. Minor cases are disposed of quickly. Some cases provoke very heated and prolonged debates. An intricate and controversial subject may be dragged over a series of meetings.

Whenever there is any difference of opinion on any question, the decision of the majority of those present is binding, unless the Governor-General should take upon himself the

[1] See *Lord Minto in India*, pp. 26-7. Letter of Lord Minto to his eldest son, Gilbert (later Lord Minto), dated 15 September 1807.

[2] When the Council used to meet outside the Secretariat Buildings, as till recently, the Secretaries had 'to spend the greater part of Friday mornings waiting in an ante-room for the business in which they are interested to come on'. 1919 *Report*, p. 29. Now the Executive Council Chamber in Delhi is within the Secretariat Buildings and Secretaries work in their rooms until called to Council.

[3] The present procedure, as will be stated presently, is somewhat different.

responsibility of overruling the majority. Each Member has one vote, but in the case of a tie the Governor-General or the person presiding has a second or casting vote. It is believed that up to Lord Chelmsford's time, decisions were almost invariably recorded by formal votes. Lord Reading introduced and generally observed British Cabinet practice in this regard. Decisions were normally reached by agreement instead of by the formal recording of votes. This has since been the normal practice. A decision is now taken by vote only if there is serious difference of opinion, or if some Members persist in maintaining their own point, making the chances of agreement extremely remote.[1]

Until 1935 the Executive Council had no Secretary of its own. The Private Secretary to the Viceroy, by reason of his intimate association with the Viceroy on the one hand and the Members and the Departments on the other, served in a sense as the Secretary. He arranged something like informal agenda for Council meetings and kept in his office a record of all Council decisions. The proper execution of such decisions was, however, the responsibility of Departmental Secretaries. The Private Secretary did not attend Council meetings. Lord Willingdon started the practice of having his Private Secretary, Sir (then Mr) Eric Miéville, by his side at these meetings. Later on, formal recognition was given to this practice by giving Sir Eric the additional designation of Secretary to the Executive Council. This latter post was created with effect from 1 November 1935, with a separate office, consisting of a superintendent and two clerks.[2] The Secretaryship is no longer held by the Governor-General's Private Secretary. At present the Secretary in the

[1] After the decision is made the Governor-General asks the dissentients if they desire to put in any minutes of dissent. Sometimes the minority, though they still differ from the majority and doubt the wisdom of their decision, would acquiesce and refrain from recording their dissent in a formal minute. If, however, they elect to do so, the dispatch to the Secretary of State (if the subject requires a dispatch) is signed by all, with asterisks against the signatures of the dissentients. The papers are afterwards sent to such Members so as to enable them to draw up their dissents which are forwarded to the Secretary of State in due course. In urgent cases a telegram is sent to the Secretary of State mentioning the names of the dissentients and giving the gist of their arguments.

[2] Vide *L.A.D.*, 1936, vol. VII, p. 1475. Mr Miéville had been previously deputed to study the working of the Cabinet Secretariat in England.

Legislative Department is also Secretary to the Executive Council.[1]

The main duty of the Secretary to the Executive Council is to ' co-ordinate the work that comes before the Government as a whole and to make and maintain a record of the discussions and decisions in Council '.[2] He prepares, under the direction of the Governor-General, the agenda of its meetings and sends these agenda to the Members of Council. He has to see that no case comes up to Council in an incomplete form. He must ensure that there is no unnecessary delay in the submission of cases to Council. One of his important duties is to eliminate from the agenda of the Council cases which are not of real importance.

In addition to the Governor-General and the Members of Council, the other persons present at Council meetings nowadays are the Secretary to the Executive Council, the Secretary or Secretaries of the Department or Departments concerned, and the Private Secretary to the Viceroy. Occasionally, heads of Departments may attend by invitation. The time-honoured practice was for the Secretary of the Department concerned to open the case. Recently, however, the practice has been changed. It is the Member in charge of the Department who now normally opens the discussion ; sometimes a Member may request the Secretary to open the case. After the Member has finished he may ask the Secretary to supplement what he has said. Or, it may be that the Member differs from the Secretary and wants him to explain his point of view. The Secretary does not speak unless he is asked for explanation or information. The recording of decisions is no longer his business.[3] This is the duty of the Secretary to the Executive Council.

[1] Now (1939) the post of Secretary to the Executive Council is held along with those of Secretary to the Governor-General for Defence Co-ordination and Secretary to the Government of India in the Department of Defence Co-ordination.

[2] *L.A.D.*, 1935, vol. V, p. 1058. Sir Henry Craik (Home Member) in answer to a question in the Assembly.

[3] In the Council-room there is an oval table. The Viceroy sits at the centre. On his right sits the Commander-in-Chief. Next to him sit the other Members in order of seniority. The Secretary of the Department sits next to the junior Member. Next to him is the Private Secretary to the Viceroy. The Secretary to the Executive Council sits on the left of the Viceroy. If the Viceroy wants to make some confidential communication to his colleagues or if confidential discussion is desired, the outsiders may be asked to leave the room.

One recent innovation may be noted. This is the Economic Sub-Committee of the Executive Council. Its genesis was thus stated by Sir George Schuster, Finance Member: 'We have had recently much more difficult economic problems to deal with than formerly, and we have realized that, when one question comes up, it almost always involves a number of different Departments. Hitherto, in the ordinary machinery of the Government of India, there had not been easy opportunities for joint discussion, between Departments, of cases that are still in an undeveloped stage. Cases were discussed jointly when they came up before the Executive Council as a whole and then it was only on certain occasions that cases were brought up before the Executive Council. Now . . . we have started the organisation of an Economic Sub-Committee of the Executive Council which enables us to get together and consider matters before they have reached their final stage.'[1]

The Economic Sub-Committee hitherto consisted of four members, namely, the Members in charge of (*a*) Finance, (*b*) Commerce and Railways, (*c*) Industry and Labour, (*d*) Education, Health and Lands. After the reorganization of 8 November 1937, the four members are : the Members in charge of (*a*) Finance, (*b*) Commerce, (*c*) Railways and Communications, and (*d*) Education, Health and Lands. *Ad hoc* Sub-Committees of the Executive Council are occasionally formed.

[1] *L.A.D.*, 8 March 1934, vol. II, p. 1896.

10

THE CHARACTERISTICS OF THE EXECUTIVE COUNCIL AND THE PLACE OF THE GOVERNOR-GENERAL THEREIN

THE Executive Council of the Governor-General has certain important characteristics. In the first place, it is subject to the control and authority of the Secretary of State. It is bound loyally to carry out the orders and directions of the Home Authorities. And this is true as much in the sphere of legislation as in that of administration. Sir Henry Fowler (later Lord Wolverhampton), a former Secretary of State, defined the position of Members of the Executive Council in the following terms:

'So long as any matter of administration or policy is undecided every Member of the Government of India is at liberty to express his own opinions; but when a certain line of policy has been adopted under the directions of the Cabinet, it is the clear duty of every Member of the Government of India to consider, not what that policy ought to be, but how effect may best be given to the policy that has been decided upon; and, if any Member of that Government is unable to do this, there is only one alternative open to him',[1] (that is, resignation). A Member of the Executive Council, therefore, resembles in some respects a Cabinet Minister in so far as he actively participates in the determination of Governmental policy and administrative action, and in some respects a Minister outside the Cabinet, in that he is bound, as long as he is in office, to carry out the decision of the British Cabinet, or in effect, its mouthpiece, the Secretary of State for India.

In the second place, and as a corollary to the first, the Executive Council is absolutely irresponsible to, and unrepresentative of, the Indian Legislature. No Member is responsible

[1] (Mrs) R. Hamilton, *The Life of Lord Wolverhampton* (*Sir Henry Fowler*), p. 316.

to any Indian constituent. As a matter of fact, no elected member of the Indian Legislature has so far been appointed to the Executive Council. Even if such a person were appointed he would cease to be an elected member from the moment of his taking office. And, he would, constitutionally, be as irresponsible to the Indian Legislature as any other Member of the Executive Council.

Thirdly, the Executive Council is a composite body, consisting of a number of heterogeneous elements. It consists of Englishmen and Indians, Civil Servants and non-officials. Taking the present Council[1] we find that the President of the Council is a Conservative British politician, and of the Members, one is a high Army official, the chief of all the Defence Forces, one is a financial expert belonging to the British Civil Service, imbued with the traditions and prejudices of the British Treasury and the City, three (of whom one is an Indian) are members of the Indian Civil Service, and two are Indian lawyer-politicians. In their common subordination to the British Cabinet and in their common control of the supreme machinery of the Indian Government lie their only unity. Otherwise, there is hardly 'a common policy and common political ideas and ideals', at any rate, between the Indian and non-Indian elements.

Fourthly, the Executive Council is characterized by 'the principle of united and indivisible responsibility'. There may be all sorts of internal differences; any given decision may in reality be the decision of a bare majority, or even of the Governor-General alone; still to the outside public the Executive Council must present a united front and have the appearance of a harmonious team. This principle of unity pervades the entire sphere of Government, administrative as well as legislative. As long ago as the 'sixties, Sir Charles Wood strongly expressed himself to the effect that the Members of Council ought to follow the rule of the British Cabinet and exhaust all differences of opinion on important Government measures by discussion in the Executive Council.[2] 'A Government, whether in Downing Street or Calcutta,' wrote

[1] i.e. the Executive Council of 1938.
[2] Vide Minutes of Sir Henry Maine—Note, dated 20 February 1866.

Sir Henry Fowler, 'must act as a homogeneous body.'[1] Discussing the attitude of certain Members regarding the cotton duties and their desire of abstaining from supporting the Government measure in the Indian Legislative Council, Sir Henry wrote :[2]

'The Cabinet have very carefully considered the whole question of the Members of the Executive Council, and they are of opinion that the English precedent applies, and, therefore, that Members of the Executive Council must, as Members of the Government here do, vote together in support of Government measures. If they are unable to do this, then the English precedent also applies, and the objecting Member resigns, before he either abstains from voting[3] for, or votes against, the measure. . . . I should be very sorry to think that you have in your Council any man who would dispute the supreme authority of the Cabinet on a constitutional question, and by withholding his resignation, necessitate his dismissal. However, my duty is clear ; and, with the cordial support of my colleagues, I shall immediately advise the Queen to dismiss any Member of the Council who so far forgets what is due to his own position and to the position of the Viceroy as to attempt to continue a Member of a Government whose policy he is unable to support.'[4] The admonition, it is

[1] Hamilton, *The Life of Lord Wolverhampton*, p. 315.

[2] Letter to Lord Elgin; see Hamilton, *The Life of Lord Wolverhampton*, p. 317.

[3] A very striking, and perhaps the only, exception was the deliberate abstention of Sir N. Sircar, Law Member and Leader of the House, from voting on Mr Jinnah's amendment in favour of the Communal Award. All the other Members of the Executive Council sitting in the Assembly (Sir J. Bhore, Sir H. Craik, Sir F. Noyce and Sir J. Grigg) voted for Mr Jinnah's amendment. Sir Nripendra Sircar by this abstention showed open disapproval of a vital decision of the British Government. In view of his known strong opinions on the matter an exception was probably made. Even so, he did not, perhaps was not permitted to, vote against the amendment. There is no instance of a Member of Council voting against a Government measure. For Sircar's vote, see *Legislative Assembly Debates*, 7 February 1935, vol. I, p. 572.

[4] The obligation of Members extends beyond the Legislature. In their public speeches they cannot criticize the accepted policy of the Governor-General in Council. On 15 September 1936, Mr Satyamurti raised this question in the Assembly in connexion with the alleged criticism of the protectionist policy of the Government of India by Sir J. Grigg, Finance Member, in public speeches. Sir Nripendra Sircar denied the allegation against the Finance Member and defined the position of Members in this regard as follows : 'The view of Government is that complete identity of opinion is no more possible among the Members of a Government than among the members of any other associated body.

needless to say, had the desired effect. It is thus clear that a dissentient Member has two alternatives : either to give active support to the decisions of Government, or to clear out. The first is certainly the more prudent and accepted course. Resignation on account of difference of opinion, as that of Sir S. Nair in 1919 on the Punjab issue, is very rare indeed. Even where such resignation does take place, the real reason for such action will usually remain undisclosed to the outside public. One necessary concomitant of the principle of unity within the Executive is the secrecy of its proceedings and the non-disclosure of the individual views of the Members who have taken part in the proceedings. A necessary counterpart of the doctrine of collective responsibility is the obligation of the Members to take no important decision in their respective spheres without the approval of the Council, at any rate, of the Governor-General. For, surely, if the Members have to share responsibility for the acts of their colleagues and to defend their actions, it stands to reason that such actions should receive their approval. In minor cases this consent is tacit, but in major matters positive assent is, in practice, required. The classical case on this point is that of Sir Thomas Holland in respect of his action in the Munitions Board Fraud case.

In this case four persons were charged with conspiracy to cheat the Munitions Board in August 1918 in respect of the supply of a quantity of wire-rope. The prosecution was launched at the instance of the Board of Industries and Munitions, with the approval of the Government of India. With the abolition of this Board in February 1921, most of its functions devolved upon the new Department of Industries. But by a resolution of the Government of India some of its functions, including the conduct of this case, were given over to a separate temporary Department under the Chief Controller, Surplus Stores, responsible to the Member in charge of the Department of Industries, Sir T. Holland. Proposals

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The question of when an avowed divergence of opinion is incompatible with continuance in the Government of the individual Member concerned is a question of degree to be decided by the head of the Government.' See *L.A.D.*, 1936, vol. VII, p. 1062.

were made on behalf of the accused for the withdrawal of the case ; but Sir Thomas refused to entertain any such proposal so long as a civil suit for a claim of over two lakhs of rupees against the Government was threatened by Karnani, one of the accused. In July 1921, the solicitors of Karnani intimated that their client had dropped the claim. Accordingly, Sir Thomas called for a fresh appreciation of the situation by the D.I.G. of Police, Calcutta, who was placed in charge of the case. This officer as well as the Advocate-General of Bengal expressed the opinion that there was some element of uncertainty, and that the case would require a protracted and costly trial. Sir Thomas thought that if the prosecution succeeded Government might suffer from the sinister imputation that it had deliberately injured Indian industrial development by striking at the Karnani Industrial Bank, while, if it eventually failed, Government would have to face the additional criticism that it had unjustifiably wasted public money. So on 4 August he issued final orders for the withdrawal of the case.[1] In asking the court's permission to withdraw from the prosecution, the Advocate-General, Mr T. C. Gibbons, emphasized that he had conclusive proof of the accused's guilt, but that other considerations had influenced the Government of India : for they ' have been informed from various sources that if the prosecution of Karnani and Banerjee were proceeded with, widespread commercial and industrial interests would be seriously affected. . . . Government consider that it is preferable that these men, though in their view guilty, should escape punishment rather than that a number of innocent persons should suffer loss '.[2] The case was withdrawn on 5 August. This was followed by intense agitation in England as well as in India, especially in the Anglo-Indian press. The Government of India was severely criticized and taunting remarks were made about the ex-Chief Justice of England. It was then disclosed that Lord Reading had no hand in the decision. Sir Thomas Holland now became the target of virulent attack. The Government of India had to issue a communique explaining

[1] Sir T. Holland consulted two of his colleagues who agreed to the withdrawal, ' though not on wholly identical grounds '.

[2] See the *Statesman* (Calcutta), 6 August 1921.

their position. 'The withdrawal from the prosecution cannot be treated as the result of a considered decision by the Governor-General in Council.'[1] Sir Thomas Holland from the outset accepted full responsibility for the action and deeply regretted his omission to consult the Governor-General. Government emphatically repudiated the doctrine on which the withdrawal was based, and also disapproved the assertion of guilt of the accused when prosecution was discontinued. The fate of the Hon. Member was practically decided.[2] On 2 September, it was announced that His Majesty, on the advice of the Secretary of State, had accepted the resignation tendered by Sir Thomas Holland.

The resignation of Sir Thomas Holland has its parallel in that of the late Mr Montagu in 1922. In each case an important decision was taken without the knowledge of colleagues who later repudiated the action and thereby forced resignation. It might happen, however, that a decision so taken by a Member, though disliked by his colleagues, is subsequently ratified, as the Cabinet did in respect of the Hoare-Laval agreement. In such a case there need be no resignation. It is permissible to believe that in India important decisions are not infrequently made in the name of the Government of India which are virtually the decisions of individual Departments. Even in the Munitions Fraud case, 'if it had not been for the independence of the Advocate-General, whether mistaken or not, a nefarious transaction might have slunk past unobserved and unrebuked',[3] and the public would never have had the knowledge that it was an individual action. It may be assumed that, in different circumstances Sir Thomas would have escaped with a rebuke from the Governor-General. As things stood, however, the Government of India looked so compromised that they found it expedient to save their own reputation by throwing Sir Thomas Holland overboard.

The last, but by no means the least, important feature of the Executive Council is the predominance of the

[1] Government of India Communique of 28 August 1921.
[2] His immediate resignation was demanded, for instance, by the *Statesman*.
[3] The *Statesman*, 30 August 1921.

Governor-General. The part played by the Governor-General in the Executive Council largely depends upon his own political position and personality as well as the character and personality of his colleagues. Even so, his pre-eminence in the Council is patent and undisputed. The semi-royal status of his office and the pomp and ceremony surrounding it give him a unique position of dignity and superiority. He is the Crown visible in India, being His Majesty's personal representative. He is the first citizen in the whole of the Indian sub-continent and enjoys an enormous salary and handsome allowances. He generally possesses high social and political rank which is far above that of any of his colleagues. He is or becomes a peer when he comes to office. He is in a special sense the representative of the British Government, having a first-hand knowledge of, and intimate and constant contact with, it. He is the embodiment of the Indian Government in a real sense ; the credit or the blame for its conduct is associated with his name both by the public and by the Home authorities in a way in which it is not done in the case of any of his colleagues. All these factors place him in a position to command the unstinted and ungrudging respect, if not obedience, of his colleagues.

Besides, he is in control of the activities of the Executive Council, with the absolute power of assembling it when he likes and of fixing its agenda and regulating its deliberations. Equality of vote in the Executive Council does not imply equality of weight ; even there he has a casting vote. And, above all, he holds in reserve his overriding power which, rarely pressed into action, has, none the less, an important psychological effect on the Members of Council.[1]

How far, if at all, a given decision of the Executive Council is influenced by the Governor-General, depends on the circumstances of the case. His knowledge of, and interest in, the subject-matter and the strength of his insistence on his own view, are important factors. It may be reasonably assumed, however, that his view, possibly with a little modification, will ultimately prevail in ninety-nine cases out of a hundred, if it

[1] Under Mayo's rule, says his biographer, 'the Council was never for a moment allowed to forget that the Viceroy retained the constitutional power, however seldom exercised, of deciding by his single will the action of his Government'. Hunter, *Life of Earl of Mayo*, vol. I, p. 194.

is pressed with sufficient strength and persistency. Whether that will be done, or is usually done, is, however, another matter.

What ordinarily happens in respect of Council cases is this. All important cases have already been thrashed out between the Member and the Governor-General and an agreement or compromise arrived at between the two. When a proposal of this nature comes before the Council it is most likely to pass the Council in that form, or with slight modifications effected either to secure unanimity or to incorporate an obvious improvement suggested in the course of discussion. That this happens is due at least to two reasons. Firstly, there is the importance of the Departmental point of view, especially among the officials in India who generally believe that every man knows his business better than others ;[1] secondly, there is the weight of the Governor-General's authority behind it. In financial matters the Council is at a disadvantage. The Viceroy and the other Members are usually laymen without any knowledge of the intricacies of finance and currency. The Finance Member is an expert, or is believed to be one, and is usually imported from the British Treasury. The chances, therefore, are that the Finance Member's point will be accepted, especially where the Governor-General agrees with him, as he usually does.[2]

The Commander-in-Chief has also a unique position in the Council in respect of matters arising in his Department. Formerly, that is until 1906, he was the executive head of the Army, but all his proposals to the Government of India as well as the decisions of the Government in respect of Army affairs were made through the Military Member. Proposals of the

[1] As Hunter put it : ' The experience of Indian officials leads them to assume that the man whose business it is to know what is needed, does, as a matter of fact, know it best.' ibid., p. 196.

[2] ' I am not aware ', wrote Sir Henry Maine, ' that ever since Mr James Wilson came to India in 1857, as the first Finance Member, any proposal of the Member of Government holding that office has ever been rejected when the Governor-General agreed with it. . . . When I was myself a Member of the Government of India, the proposals of our financial colleague were always thoroughly discussed ; but if he was not convinced, and had the Governor-General on his side, he always had his way.' Maine's Minute on the Secretary of State's Financial Dispatch, No. 261, dated 17 July 1879, approving the action of Lord Lytton in respect of Cotton Import Duties. Vide *Parliamentary Papers*, 1878-9, vol. 55, pp. 332 ff.

Army Chief were, therefore, subjected to the scrutiny of another expert who often looked at them from the administrative and financial standpoint. As experts are in the habit of falling out, the Governor-General as well as the Council could choose between the two views, due weight being given to the Commander-in-Chief's opinion. But now the Commander-in-Chief is the executive head of all the Defence Forces as well as the only constitutional adviser of the Governor-General in Council in defence matters. The Governor-General and the other Members, all being laymen, must find it extremely difficult to overrule him, if he refuses to yield.

It is difficult to estimate the influence of the Indian Members on policy and administration. From 1909 till shortly before the introduction of the Reforms of 1919, there was only one Indian Member in the Executive Council. Now, of course, there are three of them. No important portfolio has hitherto been given to an Indian Member, except that of Commerce and Railways of which the first holder was Sir Joseph Bhore. At the present moment Sir Zafrullah Khan holds the portfolio of Commerce, Sir N. Sircar of Law, and Sir J. Prasad of Education, Health and Lands.[1] Sir B. N. Mitra officiated as Finance Member only for a short time. So long as the Indian Member was only one among eight, his views could not have very great weight ; the fact of his being only one among so many must have had a damping effect on the vigour and persistency of his views. The addition to the number has certainly changed the position to a great extent. It is believed that when the three Indian Members are in agreement, the Europeans, though in a numerical majority, often yield. The Viceroy himself gives special consideration to such unanimous views and often throws in his own weight on their side. Where the Indian Members differ, as they not unoften do, their position becomes necessarily weak. It is generally believed that in respect of matters relating to Indians overseas, the influence of the Indian Members on decisions has been considerable.[2]

[1] This was written in 1938.

[2] There are two main reasons ; firstly, the practical unanimity of their views on such questions ; secondly, European opinion on such issues are generally in unison with the Indian attitude.

The position of the Indian Members is one of inherent difficulty. 'The function and duty of a non-official Member of the Executive Council', said Sir Ramaswami Aiyar, officiating Member of Council, 'are, I take it, to explain and elucidate what may be called the non-official point of view to his colleagues in the Government and, on the other hand, to try to explain to the people at large that point of view, which fortified by his experience of official affairs, he is able to present to the country.'[1] The performance of this double duty is a very delicate task indeed. The Indian Member stands, on the one hand, the risk of being regarded by his European colleagues as an extremist lacking in a proper sense of reality and of responsibility. On the other hand, he is likely to be charged by his countrymen with being a sycophant of the Government and its henchman and a betrayer of the national interest. His position becomes most difficult during periods of high political tension or on occasions of acute controversy between the Government and the public.

It has to be remembered that the Indian Members have no representative capacity ; none can even be said to have any following. They occupy their positions not by right, but by favour, and this makes all the psychological difference in the world. The power, prestige and honour of the office are powerful attractions ; its emoluments are natural temptations. Successful execution of the duties of the office brings royal favours. A K.C.S.I. is a mark of success and the Viceroy is the judge of such success.

It is an undeniable fact that the persons chosen are not often the most eminent men available ; in some cases their eminence dates from their appointment. All things considered, they are the best available. 'Sweet reasonableness' is undoubtedly a test of availability.

Public good is surely the object of taking office, but self-interest is the immediate motive. They are certainly patriots and have the interests of the country at heart. They

[1] *L.A.D.*, 1932, vol. V, p. 1567. Evidently he meant an Indian Member. It must be remembered that of the three Indians one is almost invariably an official who has been in Government service all his life and cannot be expected to understand and explain adequately the non-official reaction to Government measures.

are, however, not extremists but 'moderates' in politics. They believe in ordered progress, even if slow. And, like most other men, they probably believe that the interests of the nation are better served by their being in office than out of it. They are, it must be remembered, in a permanent minority and have, therefore, to take up an attitude of compromise and reasonableness. For all these reasons their presence in the citadel of power has merely given it a jerk but no violent shake. Due to their presence the Executive have not shown any appreciable responsiveness to Indian public opinion or proper understanding of its depth and significance.[1] They are no doubt 'as open-minded, as firm and as determined in expressing their opinion and endeavouring to have their own way as any other Member of the Governor-General's Council'.[2] Sometimes, maybe often, they carry their points when they are unanimous. But it remains true that generally in fundamentals they have either failed adequately to represent and elucidate public feelings to their European colleagues, in which case they have failed in their duty; or, alternatively, they have fully pressed the Indian view, but without success, and still remained in their posts. The certification of the Salt Tax in 1923, the personnel of the Statutory Commission, the dropping of the Reserve Bank Bill in 1928, are some of the instances that one naturally recalls in this context. It may be pertinently asked whether a bold and determined stand by the Indian Members on such occasions was not what they owed to their position, and whether in that event the final decisions on such questions would not have been different.

The relation between the Governor-General and his Council is normally one of cordiality rather than friction. Most Governors-General have not found real difficulty in dealing with their Councils. Wellesley and Lawrence were alone in making any serious complaints. But they were extremely overbearing, impatient and autocratic by nature. Such able men as Dalhousie and Curzon had on the whole no occasion to complain. Members of Council do not hesitate

[1] cf. Mr Rangachariar's remark in the Assembly. *L.A.D.*, (1925), vol. V, pt. 3, p. 2364.

[2] *L.A.D.*, ibid., p. 2396. Sir Alexander Muddiman's (Home Member) speech.

to differ, and differ vehemently, from the Viceroy, but, if he is adamant, in the end they do yield. The only two well-known occasions on which they remained obdurate occurred during the Viceroyalty of Lords Lytton and Ripon respectively. The facts of the Lytton case have already been related. In the other case his immediate successor, Lord Ripon, found unbending opposition of his Council to the proposal for the evacuation of Kandahar. Unlike Lord Lytton, however, he was reluctant to use his overruling power in this case. The matter was eventually decided over the head of the Government of India by the British Cabinet.

These two cases were quite exceptional. In both, the majority of the Council were deeply committed to a policy which a new Governor-General sought instantly to reverse. And a group of able men could not be expected to change their strong and considered opinions overnight. It was but natural, therefore, that Lytton found his Council 'all in a state of revolt'; and Ripon's experience was no better. On the other hand, it is remarkable that neither of the two Viceroys experienced any insuperable difference with the Council on other questions. Leaving these two exceptional cases aside, it is well to remember that 'no Viceroy . . . ever changes the policy of his predecessor'; he only 'develops it'.[1] Hence no occasion arises for the old Members of a new Viceroy's Council violently to compromise their conscience or their personal reputation.

'The task of managing Council, mostly composed of conservative people,' wrote Ripon, 'is not an easy one. Hitherto I have got on very well.'[2] A month later he wrote: 'The Council like to make a show of independence, they like to be treated with a certain amount of deference, but at last they can generally be got to do what is wanted. . . . There is a very strong desire to support the Viceroy.'[3] The attitude of his Council towards the repeal of the Vernacular Press Act is significant. This Act was one of the reactionary measures of that Imperialist Viceroy, Lord Lytton, who had

[1] Hunter, *Life of Earl of Mayo*, vol. II, p. 304.
[2] Letter to Lord Hartington, Secretary of State, dated 2 February 1881. See Wolf, *Life of Ripon*, vol. II, p. 49.
[3] ibid., p. 50; letter to Hartington, dated 5 March 1881.

it passed at a single sitting even of the tame pseudo-Legislature of that time. The Liberal Government of Gladstone, after its advent to power, was anxious to secure its speedy modification or repeal. On the private request of the new Liberal Viceroy, the Secretary of State sent an official dispatch on the matter. The Indian official world, ever anxious to exercise autocratic powers, was against the repeal of the Act. Mr Baring (later Lord Cromer) was alone among the Councillors to favour such action. Although Ripon's first impulse was to overrule his Council, he preferred to wait for some time. After eight months he was able to inform the Secretary of State that the Council had agreed to the repeal of the Press Act.[1] 'Their readiness to follow the Viceroy', wrote Ripon, 'makes them . . . afraid of being accused . . . of being nothing but dummies. . . . As I have said before, I think they are, if anything, too amenable to the will of the Viceroy.'[2]

The virtual non-use of the overriding power is a singular proof of the absence of insurmountable disharmony between the Governor-General and his Council. Differences and sharp conflicts there often are in the Council. A number of usually able men are not expected to think always alike. Nor will such men normally surrender their own views simply to fall in with the views of their chief. Any given decision is the resultant of the impact of a number of minds, though, of course, all minds do not impinge with equal weight.

It seems appropriate at this stage to inquire a little closely into the reasons which account for the practical non-use of the Governor-General's extraordinary power to override his Council. In the first place, the mere existence of this power in the Statute Book is itself an effective insurance against the risk of its exercise. Normally, the majority will find it neither useful nor politic to force the Governor-General to play this trump card. In the second place, the Members are obviously subordinate, and not equal, colleagues of the Governor-General. 'An atmosphere of holy awe surrounds his person, creating an unnatural *gêne*.'[3] The social and political status

[1] See Wolf, *Life of Ripon*, vol. II, p. 152.
[2] ibid., p. 50 ; letter dated 1 April 1881.
[3] Lord Minto to Lord Morley. See Countess of Minto, *India, Minto and Morley*, p. 12.

of the Viceroy in India, the political prestige and experience that he brings with him from England, his close and intimate relations with the Home Government, his touch with public opinion in India, the immensity of his powers and the responsibility that he has for the Government of India, all these combine to give peculiar weight and exceptional authority to his views in Council and inspire in his colleagues a sense of deep regard for their chief and an amenability to his clearly-expressed wishes. Thirdly, there is the power of patronage. The Governor-General does, in effect, fill vacancies in his Council. The office of Councillor is a prize to which able civilians look forward. There is undoubtedly the feeling of gratitude to one's benefactor and the desire to support, rather than embarrass, him. On this the following words of Lord Hartington (Duke of Devonshire) are illuminating. Explaining why it was natural for the majority of Ripon's Council to oppose the evacuation of Kandahar, the Secretary of State said, *inter alia*, that Thompson and Gibbs were both 'Members of the Council appointed by Lord Lytton. They gave the warmest adherence to the whole of the policy of Lord Lytton, as they were naturally pledged to do'.[1] While Aitcheson, a provisional Member, equally naturally 'entirely agreed with the Viceroy in his opinion that Kandahar should be abandoned'.[2] It is not in the least suggested that any sort of pledge or undertaking to support the Viceroy is either asked for or given prior to one's nomination. Yet it is common human experience that suitability is more likely to be discovered in persons who are expected to agree than to differ. It can at least be definitely stated that a prudent man will not knowingly bring within his Council a person who clearly holds different views. Efficiency, after all, is an elastic term. What, it may be asked, about the Members whom the Viceroy already finds in office? A change of Viceroy does not correspond with a change of the Council, and a new Viceroy has to work with a whole body of men who are complete strangers and in whose choice he had no hand. This becomes a real source of trouble where the new Viceroy tries his hand at a definite and

[1] *Hansard*, Ser. 3, vol. CCLIX (1881), House of Commons, 25 March 1881.
[2] ibid.

abrupt change in policy, as happened in the cases of Lytton and Ripon. But, as already stated, a violent or even marked change of policy is seldom attempted. Further, it must be emphasized that while these persons do not owe their present positions to the new Viceroy, all future preferment and honour are almost exclusively in his gift. Governors of Provinces other than those of Bengal, Bombay and Madras were and are, in fact, the nominees of the Governor-General.[1] The senior Members of the Council naturally expect to step into these coveted posts either before or after the termination of their present office. The fulfilment of their expectation will depend largely on the impression they make on their new chief. Surely, strong and unbending opposition is not the usual way in which one can well impress one's chief.

This prospect of preferment must have considerable influence on the attitude of the Members. 'As regards the personal relations between the Governor-General and the Members of the Executive Council,' observes Sir Tej Sapru, 'making allowance for the personal equation of both, and assuming that there is a readiness on both sides to understand each other's point of view and meet it as far as possible, the great political patronage which the Governor-General enjoys should not be lost sight of even in the case of such high dignitaries. There is a considerable body of opinion which has in the past disfavoured, and still disfavours, the appointment of Members of the Executive Council to Governorships. . . . On principle, it is not right and proper that the preferment of Members of the Executive Council should depend upon the recommendation of the Governor-General.'[2] Sir George Chesney expressed the same opinion quite emphatically long ago. 'I am far from wishing to imply that these conditions exert any conscious influence in restraining the independence of a Councillor. The sense of duty, and a man's own temperament whether in the way of obstinacy or weakness, are usually more powerful incentives to conduct than the smaller impulse of self-interest.'[3] With these words he tried to soften the

[1] See pp. 80-82.

[2] Sapru, *The Indian Constitution*, pp. 58-9.

[3] Chesney, *Indian Polity* (1894), p. 133.

statement he made. But the unconscious may have nearly the same influence as the conscious. And self-interest is not unoften the mainspring of a man's actions.[1] This inducement, it must be noted, is open to the Indian Civil Service Members only, for these prize posts are practically the close preserves of that fraternity. There is the further limitation that it has no application to the Indian members of that Service, for up till now none of them has been thought fit for the job. Still, it is not unreasonable to think that the prize was, with perfect justice, not believed to be entirely out of reach by one or two of them.[2]

The desire for honours is also a powerful factor. A K.C.S.I., for example, is the fulfilment of an ambition as well as the public recognition of a man's worth. And there are higher honours to aspire for. In this respect also the Viceroy plays a decisive part.

There are other potent reasons. It is significant that Members very seldom resign in protest. The handsome emoluments of the office, apart from future prospects,[3] and the power and position due to Membership, are strong deterrents. Moreover, unlike a Cabinet Minister, a person so resigning sinks into virtual obscurity rather too soon, for he cannot have the prospect of a political life in England.[4] Further, great harm will be done to British imperial interests if a European Member were to resign, specially in favour of the Indian viewpoint.

All these reasons largely explain why the overriding power has remained practically unused. On the other hand, what would happen if, notwithstanding all the above considerations, the majority feel so strongly that they remain

[1] Sir Valentine Chirol wrote, 'So long as it [membership of the Viceroy's Council] is, as at present too frequently happens, merely a stepping-stone to a Lieutenant-Governorship [now, of course, Governorship which is a more dignified and better paid office], it is idle to expect that the hope of advancement will not sometimes act as a restraint upon the independence and sense of individual responsibility which a seat in Council demands.' See Chirol, *Indian Unrest*, p. 313.

[2] But there are other offices, though less covetable, e.g. High Commissionership or Chairmanship of Tribunals, or some high legal office to which they might aspire.

[3] Such as Governorships in India and seats on the Secretary of State's Council (now posts of Advisers to the Secretary of State) in England.

[4] This remark applies to the British members.

adamant? In such a very rare case the position of the Governor-General is no easy one. Pitted against him is the opinion of the able and experienced men ripe in the service, and he must be a very strong Viceroy who will confidently brush it aside. Most probably he will yield. After all, the power to override has its tremendous responsibility.[1] It is practically certain that, unless it vitally concerns a matter of high policy endorsed, if not prompted, by the Home authorities,[2] the Governor-General will yield.

It should also be remembered that, though temperaments and outlooks differ, there is no difference in fundamentals between the Viceroy and the majority of his colleagues. Coming from the same dominant race, believing in the Providential nature of British rule and its necessity, trained in the same public schools and Universities, the difference between them is one of degree, of emphasis, rather than of kind. Besides, between the Governor-General and his colleagues there is no conflict of loyalties, because both are responsible to the same authority.

The Government of India is traditionally a government in Council. Since 1861 the Council, as already stated, need not be consulted in all cases; even so, decisions are taken in the name of the Governor-General in Council. There are, of course, certain matters in which the legal power is in the Governor-General; in this field the Council has in practice an advisory function. But in respect of all other matters power is definitely vested in the Governor-General in Council.[3]

[1] Cf. the following remarks of Lieutenant-General Richard Strachey, then a member of the India Council, in defence of Lord Lytton's action in overruling his Executive Council in 1879: '. . . The Governor-General should feel the weight of the responsibility placed upon him, not lightly to act on his statutory power of overruling his Council. . . . But there is a corresponding responsibility resting on the Members of his Council not lightly to oppose the authority of the Governor-General, which . . . both the law and the traditions of the office place far above a mere voting power on a footing of equality with the rest of the Council, and if ever that authority should be respected it should surely be when it is exerted to give effect to a policy dictated by the Secretary of State, and supported by Parliament.' Vide *Parliamentary Papers*, 1878-9, vol. 55, p. 332 ff.

[2] See pp. 57-8, ante.

[3] In the beginning the personal powers of the Governor-General were totally non-existent. Every power, executive as well as legislative, belonged to the Governor-General in Council. Even the overriding power could be exercised only after the matter had been debated in Council. The beginning of personal

In these matters, all decisions are taken in the name of the Governor-General in Council; and all important matters have actually to be decided in Council. Even in respect of orders from the Secretary of State, which are legally binding on the Governor-General in Council, the Governor-General has no right to act without communicating them to the Council.

In the long list of Governors-General, Wellesley stands out as the only Governor-General who deliberately and systematically ignored his Council and practically reduced it to a cipher. His actions, as we have seen, were thoroughly unconstitutional. During Lord Minto's régime the voluminous private correspondence between him and Lord Morley, the Secretary of State, to some extent eclipsed the Council. During the War Lord Hardinge totally ignored the Council in respect of the very important matter of the Mesopotamia Expedition. The entire business was confined between the Governor-General and the Commander-in-Chief. The scandals of that expedition and the utter breakdown of the medical arrangements, led to the appointment of a Parliamentary Commission under the chairmanship of Lord George Hamilton. The action of the Governor-General in omitting to consult the Council and keep it informed of the progress of the operations was severely criticized by this Commission.[1] In defending his action against the criticism of the Commission, Lord Hardinge referred to Sec. 39 (2) of the Government of India Act, 1915, and maintained that 'there was nothing unconstitutional in the procedure'.[2] This argument was traversed by Lord Lansdowne, another ex-Viceroy, who observed, 'I always understood that section to be intended to provide for emergencies where the Viceroy found himself unable to call his Council

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power dates from the grant to the Governor-General of the power to assent to laws. Then in 1861, two other important personal powers were given to him, namely, (i) the requirement of his previous sanction to the consideration of certain measures in the provincial councils, and of his assent to all provincial Acts, and (ii) the power of promulgating ordinances. The process continued. In the 1919 Act, there was a considerable addition to his personal powers. In the Act of 1935 the climax has been reached.

[1] *Mesopotamia Commission Report*, 1917. cd. 8610.

[2] House of Lords Debate on the above Report: Vide *House of Lords Debates*, 3 July 1917.

together. . . . But, apart from technicalities altogether, I am sure that the Viceroy cannot be too careful to consult his Council and to call them together frequently and regularly.'[1] Quite clearly, Lord Hardinge's action was unconstitutional. The section which he quoted laid down that 'at any meeting of the Council, the Governor-General or other person presiding and one ordinary Member of the Council may exercise all the powers and functions of the Governor-General in Council'. This, as Curzon rightly held, 'only fixed a quorum for the transaction of business, and could not possibly be held to justify the failure to summon Council as a whole, or the usurpation of its powers by a small minority of its members'.[2] Besides, and this is absolutely fatal to Lord Hardinge's contention, the quorum of two was to consist of the Governor-General and one ordinary Member. The Commander-in-Chief being an extraordinary Member,[3] there could be no valid meeting of the Council when only the Governor-General and the Commander-in-Chief were present. One incidental, but most remarkable, feature of this case was the attitude of the Members of Council. That they 'should ever have consented to acquiesce in such a denegation of their powers . . . was perhaps the most astonishing feature of the entire transaction'.[4] This episode proves two things: firstly, a powerful and domineering Governor-General may very considerably strain his powers; and secondly, the Members of Council are somewhat helpless in the face of such usurpation of their rightful power. Under the procedure, they may not know of the event until after it has occurred, and, even if they do, they cannot prevent it, except probably by immediate resignation or threat of resignation. On the other hand, as we have seen, the Members, either individually or as a group, cannot take any important decision without the knowledge and concurrence of the Governor-General.

[1] House of Lords Debate on the above Report: Vide *House of Lords Debates*, 3 July 1917.

[2] Curzon, op. cit., vol. II, p. 118.

[3] See p. 79, note 1, ante.

[4] Curzon, op. cit., vol. II, pp. 118-19.

II

THE GOVERNMENT OF INDIA AND THE SECRETARY OF STATE FOR INDIA

'THE vastness and importance of Her Majesty's Indian Dominion, however they may add to the dignity of those who are called on to administer its affairs on the spot, in no degree exempt them from the necessary tie of subjection.' Thus observed a former Secretary of State for India.[1] To make a proper estimate of the position of the Governor-General we must, therefore, examine the position of the Secretary of State *vis-à-vis* the Government of India.

Before 1784 the Home control of the Government of India was exercised by the Court of Directors of the East India Company. The Directors were subordinate to the Court of Proprietors who had, however, no direct power of interference with the Government of India and could act only through the Court of Directors. Parliament had little influence on Indian administration. Real and effective Parliamentary control[2] came through Pitt's Act of 1784 which created the Board of Control.[3] This Board was invested with full authority to superintend, direct and control all acts, operations and concerns relating to 'the Civil or Military Government or revenue of the British territorial possessions in the East Indies'.[4]

The Board was explicitly debarred from appointing any

[1] Dispatch of the Secretary of State (Duke of Argyll) to the Government of India, Legislative No. 47, dated 24 November 1870. Vide *Parliamentary Papers*, 1876, vol. 56, p. 26.

[2] Through the Cabinet.

[3] Of course, the Act of 1773 provided for the vetoing of Indian legislation by the Government. Under it, the Governor-General and his Council were required to transmit all rules, ordinances and regulations made by them to one of the Secretaries of State. The King could disallow such rules, ordinances or regulations within two years from the making thereof. Disapproval was to be signified to the United Company and the rule, ordinance or regulation in question would be null and void immediately after it was registered and published in the Supreme Court at Calcutta. Vide Sec. 37 of Act of 1773.

[4] Act of 1784, Sec. 6.

of the servants of the Company.[1] The King, by writing under the Sign Manual countersigned by a Secretary of State, was, however, empowered to remove or recall the Governor-General or any other employee of the Company in India.[2]

From 1784 until the disappearance of the East India Company in 1858, the Government of India had to work under dual control from Home. Of course, the Board of Control had no right of direct control ; its authority was exercised through the Court of Directors. The existence of two masters was at once a source of embarrassment as well as strength to the Governor-General and his Council. On the one hand, the necessity to serve two masters, who were sometimes at loggerheads with each other, made the position of the authorities in India often delicate, uncertain and weak. On the other hand, it was a source of considerable strength to the man on the spot who could skilfully play off one against the other and thereby secure his own objective. In this connexion it must be remembered that, although the Board of Control had no right of official correspondence with the Government of India, yet almost from the very beginning the President of the Board had regular private correspondence with the Governor-General. In fact, the Governor-General had to carry on private correspondence with the Chairman of the Directors as well as the President of the Board. This private correspondence undoubtedly enhanced the latter's power of control. It was of no less value to the Governor-General, for he could thereby influence the British Government to support him as against the Directors.[3]

This duality of control was ended in 1858, and the powers previously exercised by the Directors, the Court of Proprietors

[1] Act of 1784, Sec. 17.

[2] ibid., Sec. 22.

[3] For instance, Wellesley offered his resignation to the Court of Directors. Simultaneously he wrote an explanatory letter to Addington, the Prime Minister. Castlereagh, then President of the Board, wrote a private letter begging Wellesley to stay and later informed him officially that he had made representation to the Court. The Prime Minister also wrote to the Governor-General in the same sense. Soon after the Court wrote to Wellesley imploring him to stay. Wellesley, who had no mind to relinquish his post, readily agreed to the Court's request. By means of private correspondence with the Prime Minister and the President of the Board, the Governor-General manœuvred the Court into submission. See Curzon, vol. II, pp. 176-7 ; Martin, *Despatches, Minutes and Correspondence of Wellesley*, vol. III, p. iv.

and the Board of Control passed to the Secretary of State for India, with whom a Council was associated for certain purposes. The Act of 1858 brought the Government of India under the direct control and supervision of the British Cabinet, through the Secretary of State for India and, therefore, subjected it to the ultimate legal control of Parliament.

The Secretary of State in Council was a corporate body. The composition of the Council changed from time to time. Originally[1] it consisted of fifteen members, of whom seven were elected by the Court of Directors and eight were appointed by the Crown, that is, by the Secretary of State. Under the Government of India Act the number of members of the Council was to be determined by the Secretary of State within a minimum of eight and a maximum of twelve. All vacancies were filled by the Secretary of State. In order fully to safeguard the interests of the Indian Services, it was provided that at least one-half of the Members must have served or resided in India for not less than ten years and must not have left India more than five years before their appointment to the Council.[2] In 1907 two Indians were for the first time appointed to the Council. In 1917 a third Indian Member was added to it. The Members had a fixed tenure of five years which could be extended by another five years for special reasons of public advantage. They could be removed from office by the Crown on an address from both Houses of Parliament.[3] The object of this provision was apparently to give the Members a position of independence as against the Secretary of State.

The Council, under the direction of the Secretary of State, conducted the business transacted in the United Kingdom in relation to the Government of India and the correspondence with India. 'Every "order or communication" to India, and every order made by the Secretary of State in the United Kingdom, was to be laid before it, with the important exceptions of "secret" or "urgent" orders.'[4] On secret questions (i.e. questions of peace and war and negotiations with Indian

[1] Under the Government of India Act, 1858.
[2] Sec. 3.
[3] Sec. 3.
[4] Seton, *The India Office*, p. 29.

States or Foreign Powers, and answers to dispatches which the Indian authorities had marked as 'secret'), the Secretary of State was not required either to consult or to inform his Council. He was also authorized to issue without delay orders which, in his judgement, were 'urgently required', but (in non-secret business) he had to state in a minute the reasons of urgency and notify the Council.

Without the approval of the Council no order, either secret or urgent, could be issued in respect of matters which, under the Act, required the concurrence of the majority of the Council.[1] In other matters the Secretary of State was not bound by the opinion of his Council. A dissenting member could only record a minute which would remain unknown to the outside world, unless Parliament specifically required papers to be presented to itself.

The Secretary of State was empowered to constitute Committees of the Council. In fact, there were as many Committees as there were Departments in the India Office. Each Member was assigned to one or more Committees, one of the members being chairman. All Council matters were first considered in one or more Committees to which cases were taken by the permanent departmental heads concerned.

The Secretary of State was President of the Council and had an ordinary as well as a casting vote. He appointed a Vice-President to take the chair in his absence. Proceedings of the Council at which the Secretary of State was not present required his written approval.

Only important questions or matters which under the Act had to be decided in Council meetings were actually discussed in Council. In minor matters the approval of the Council was always secured by the papers being laid in the Council Reading Room for a certain period,[2] at the end of which, if there was no objection by any member to the action proposed, it was taken as approved.

[1] These matters comprised, besides expenditure and loans, the making of regulations for the distribution of patronage among the authorities in India, the restoration of an officer removed or suspended by the Indian authorities, and the appointment to certain scheduled posts of persons not belonging to the Indian Civil Service.

[2] Originally seven days, but later four days. Vide Seton, *The India Office*, p. 32.

The Secretary of State alone could bring business before the Council. It had no initiative in any matter. As Strachey remarked, 'Questions of the greatest importance, notorious to all the world, may be pending, but the Council can give no opinion on them until they are laid before it by the Secretary of State."[1]

As to the influence of the Council, much depended on the personality and character of the Secretary of State. An able and autocratic Secretary of State, like Lord Salisbury or Lord Morley, would not pay much respect to his Council. On the other hand, it must be remembered that most of the Secretaries of State came to office with an entirely blank mind on Indian affairs which it was their business to control and supervise. Many of the members of the Council, on the other hand, had long experience of Indian affairs and some held high positions in the City. Their views necessarily carried great weight with the Secretary of State. Where, however, any big issue of policy was concerned, the view of the Cabinet as expressed through the Secretary of State did ultimately sway the decision of the Council.

There were occasions of difference between the Secretary of State and the Council. But, as a general rule, such differences were not fundamental. The Secretary of State had very rare occasions to overrule his Council. The reason is that both were more or less amenable to the same influences.[2]

No doubt on occasions the Council tried and succeeded in safeguarding Indian interests. But neither the Secretary of State nor the Council ever took a determined stand against a definite attitude of the Cabinet, nor did the Council fight to the last against any measure, even though it were within their statutory control. The Council was on the whole a very conservative and reactionary body. This was quite inevitable, in view of the advanced age of the majority of its members and

[1] *India, Its Administration and Progress* (1903), p. 67.

[2] Sir Charles Trevelyan was asked if he would be surprised to learn that during the first fifteen years of its life, the Council was overruled only eight times. 'No, I should not be surprised ; so far as the Council yielded to this policy and these transactions, there was no occasion for overruling them.' His contention was that it had failed as a safeguard of Indian interests. See Report of Select Committee on East India Finance, 1873, in *Parliamentary Papers* (1873), vol. 12, pp. 113-14.

of the fact that they had spent their whole life as civil servants wielding unquestioned authority. The existence of the Council had at least three undesirable effects :

(1) It acted as a drag on constitutional advance in India.

(2) Its existence prevented the progressive devolution of powers to the Indian authorities.

(3) It made the dispatch of governmental business more complicated and slow, and therefore inefficient.

During the régime of the Company the actual control of the Home authorities over the Government of India was decidedly less than what it became after the transfer to the Crown. For this there were several important reasons : First, there was the fact of distance. Communication between India and England would take about six months either way, so that the sending of a dispatch by the Government of India and the receipt of orders or instructions from Home would take a year or more. Events, especially important events like war and foreign affairs, would not wait. So Governors-General had often to act on their own responsibility in anticipation of orders from Home. Even if the direction from Home was subsequently found to be different, the action might not, possibly could not, be reversed. There were Governors-General, like Wellesley and Dalhousie, who often deliberately acted in contravention of the anticipated orders from the Home authorities, quite secure in the knowledge that, whatever the fury of the Home authorities, they could only censure them but could not reverse their actions. Secondly, the Court of Directors did not command the same respect from their Governor-General as a Secretary of State would.[1] Thirdly, the duality in the Home authority was an important factor ; for it weakened either body in its relation with the Indian authorities.

Matters became perceptibly different after 1858. In the first place, the attitude of Parliament underwent a significant change. So long as the Company were the direct rulers,

[1] After all, they were merchants, and able men, like Dalhousie, placed at the head of an Empire, did not relish the idea of having to render obedience to such men.

Parliament's scrutiny of Indian affairs was considerable, partly because it thought that a body of traders could not safely be entrusted with the administration of a great dependency, and partly because it was jealous. Parliament could then assume the rôle of a disinterested critic. When, however, the control of Indian administration passed to the Secretary of State, Parliament felt that things could be safely left in the hands of its trusted agent. Besides, Parliament was no longer a third party, but itself became responsible for the government of India. It, therefore, did not indulge in much self-criticism. During the days of the Company, the periodical renewal of its charter was preceded by a regular Parliamentary inquest into Indian administration. That practice lapsed after 1858. Indeed, as the Montagu-Chelmsford Report stated: 'We have the paradox that Parliament ceased to assert control at the very moment when it had acquired it.'[1] Parliament's intervention practically became limited to occasions when some British interests were thought to suffer, e.g. the imposition of cotton duties in India. As a result, the India Office became the least amenable to Parliamentary criticism and supervision among all the Departments in Whitehall.[2] The absence of the breath of healthy and informed outside criticism accelerated the development in the India Office of the inevitable tendencies of a bureaucracy.

In the second place, the removal of dual authority and the substitution of a Secretary of State and a Council led to more steady and effective control. A Governor-General could no longer play the game of setting one authority against another. He could no longer think of his superior authority, the Secretary of State, in disrespectful terms as he could about 'the Chairs'. For the Secretary of State was a front-rank politician with a seat in the Cabinet and with all the prestige and authority of the Cabinet behind him. Besides, the Secretary of State was invested with decidedly more power than any single authority under the old system. He was clothed with all the powers which were exercisable, severally or jointly, by the Court of Proprietors, the Court of Directors

[1] *Montagu-Chelmsford Report*, par. 33.
[2] See Lord George Hamilton, *Parliamentary Reminiscences*, 1886-1906, p. 256.

and the Board of Control. The absence of any rival authority coupled with the disappearance of inquisitorial activities of Parliament enabled the Secretary of State, in reality, the India Office, to exercise immense legal powers with greater ease and thoroughness.

Lastly, and this is most important, the inventions of science brought about a most remarkable change. The advent of the steamship, the opening of the Suez Canal, and the laying of telegraphic cables between India and England revolutionized the situation by facilitating communications in an astonishing manner. What was formerly a matter of months became a question of days and hours. Home control was no longer bound to be *ex post facto*. The Government of India could still act in emergencies of its own motion, but the scope for independent action became extremely narrow. However much he would, a Viceroy could no longer have the free hand that a Wellesley or a Dalhousie had, for his actions could always be controlled by means of the electric wire.

In evidence before a Select Committee, in 1873, Sir Charles Trevelyan said : 'No doubt the primary function of the Secretary of State is revision and control, but I conceive that a practice has grown up, since the transfer of the Government, of more frequently originating particular works in India' (by the India Office).[1]

Sir J. Strachey, who wrote with long and intimate inside knowledge of the working of the machinery of Indian Government at either end, observed :

'The increased facilities of communication, the establishment of telegraphs, ... etc. have made the relations between the two countries far more intimate than was formerly necessary or possible, and have made more frequent the cases in which final orders cannot be passed in India ; but it is an error to suppose that the Secretary of State is constantly interfering in the ordinary work of Indian administration.' He maintained that the position in this respect did not differ

[1] He admitted that ever since Pitt's Act, whenever the Home Government was determined to overrule the persons who were immediately charged with the Government of India, they were able to do so ; but he maintained that 'the power was rarely exercised under the Company. . . .' Vide *Parliamentary Papers*, vol. 12 (1873), pp. 112-14.

from Mill's description of the position in the days of the Company. 'The action of the Secretary of State is mainly confined to answering references made to him by the Government in India, and, apart from great political or financial questions, the number and nature of these references mainly depend on the character of the Governor-General for the time being. Some men in that position like to minimize personal responsibilities, and to ask for the orders of the Home Government before taking action. Others prefer to act on their own judgement and on that of their Counsellors."[1]

In a letter to Lord Aberdare dated 24 May 1881, Lord Ripon wrote: 'There has been a marked change in the relations between the India Office and the Government of India since I knew the former in days gone by. In those times it was considered a great mistake to attempt to govern India from London. It was held the business of the Secretary of State to lay down general principles upon which India was to be administered and then so long as those principles were observed to leave a large freedom to the Governor-General and to accord him a cordial support. Nowadays owing to a variety of causes, and among them to the telegraph and the increased facilities of communication, . . . a different system to a great extent prevails, and the interference of the India Office has largely increased. . . .'[2] Allowance must, of course, be made for some possible exaggeration. Yet it is true that Lord Ripon experienced meticulous control in respect of minor matters of detail.[3]

It is undoubtedly true that the Secretary of State did not constantly interfere in the ordinary work of Indian administration. Apart from any other reason any attempt to do so would have practically stopped the wheels of the governmental machinery in India. Yet, apart from the greater effectiveness of control in larger matters of policy, there was unquestionably an increase in the extent and degree of control in respect of comparatively minor matters of detail. Among other things,

[1] Strachey, op. cit., p. 52.
[2] Wolf, *Life of Ripon*, vol. II, p. 68.
[3] 'His most titanic fights with the reactionary Council of the Secretary of State were seldom on matters of high principle. Almost the bitterest of all turned on the question of the gauge of a railway.' ibid., p. 165.

this was due to (*a*) the presence in the India Office of men having vast and varied experience of a whole life of active service in India, and (*b*) the increased efficiency, along with other branches of the Home Civil Service, of the higher ranks of permanent officials in the India Office.

The enjoyment of extremely large and internally uncontrolled powers by the Governor-General and his Council, and the authority and splendour of the Governor-General's office, often made the head of the Indian Government highly sensitive to superior control from Home. At times there was a strong disposition at Whitehall to pull the strings too tight. Distance and the absence of personal contact added a further difficulty by occasioning misunderstandings which were unavoidable in correspondence over delicate and complex issues. On many occasions there were sharp differences between the two Governments.

We may appropriately discuss at this stage some of the past occasions of controversy between the Secretary of State and the Government of India, for they will throw light on the nature of the relations between the two.

(*1*) *Controversy over the Civil Procedure Bill in 1864*

In a dispatch of 31 October 1864[1] the Secretary of State suggested to the Government of India the postponement of further consideration of a Bill for amending the law of Civil Procedure, pending the receipt of further instructions from him. The Government of India objected to the course suggested. They argued that the Indian Councils Act of 1861, while reserving to Her Majesty the veto over Indian legislation, did not appear to contemplate that the consideration of any Bill, regularly introduced into the Council of the Governor-General for making laws and regulations, should be stayed by orders from Home. They also pointed out that if such a suggestion took the form of an order, it might prove very embarrassing in the case of a Bill brought in by an additional member of the Council.[2] In repudiating this contention of the

[1] Sir Charles Wood's Dispatch, No. 34, dated 31 October 1864. Vide *Parliamentary Papers*, 1876, vol. 56.

[2] Government of India's Dispatch, Legislative, No. 15, dated 15 December 1864. Vide *Parliamentary Papers*, 1876, vol. 56, p. 20.

Government of India, Sir Charles Wood, Secretary of State for India, observed : 'The Dispatches of the Secretary of State, to whatsoever subject they may relate, are addressed to the Government of India . . . to be dealt with at their discretion. . . . Nor does it make any difference in this respect, that they may happen to relate to subjects on which legislation is proposed or is in progress. They are intended to influence the conduct of your Government as an executive body, in dealing with such subjects, and not to convey the views of the Secretary of State to the legislators themselves.'[1] That is, the Government of India were to announce the decision, in this case the postponement of further consideration of the Bill, as if it was their own. Sir Charles pointed out that the control of the Secretary of State extended to legislation as to every other action of the Government of India.[2]

On the power of disallowance he remarked, 'Surely it is more courteous and more calculated to maintain the character and dignity of the Council, that the Secretary of State should suggest to the Executive Government to suspend, and even withdraw, a Bill, than leaving them to proceed without any intimation of his opinion that he should ultimately disallow it.'[3]

(2) *Dispute over the Indian Contract and Evidence Bills*

In his Dispatch of 18 March 1869, the Duke of Argyll suggested to the Government of India the method of dealing with proposals for legislation made by the Indian Law Commissioners. After receiving any such proposal from the India Office, the Government of India might confidentially consult the High Court Judges and such other persons. If they felt any doubt on any provision, it was to be communicated to the Secretary of State. After consideration thereof the Secretary of State would send it back in the form in which he expected it to be finally passed. Except in case of strong unforeseen objection arising in their mind, the Government of India were expected

[1] Secretary of State's Dispatch, Legislative, No. 12, dated 31 March 1865, to the Government of India. Vide *Parliamentary Papers*, 1876, vol. 56, p. 20.

[2] ibid., p. 21.

[3] ibid., p. 21.

to introduce such measure into the Council and to secure its passage as a Government measure.[1]

To this Lord Mayo's Government replied that the Secretary of State's suggestion would deprive the Legislative Council 'of all real power in the discussion of the Bills in question'. The Government of India assumed that the Secretary of State did not expect them to receive the expression of his opinion as a command to introduce into the Legislative Council a measure which they disapproved. For that would reduce them to the alternative of either publicly stating that the Bill was introduced, not on their own responsibility, but in obedience to his positive orders, or else of defending it by arguments which they did not believe to be sound. Either course, they maintained, would be totally inconsistent with their position as a Government.[2]

Citing Secs. 22 and 21 of the Act of 1861, they observed: 'It appears to us that it is the effect of this enactment to invest us with a legislative discretion, and to impose upon us the duty of using it to the best of our judgement. Any other view would invest the Secretary of State with the character of the legislator for British India, and would convert the Legislative Council into a mere instrument to be used by him for that purpose.'[3] They contended that the Secretary of State ought not to direct legislation, but should, if necessary, veto an Act passed by the Indian Legislature.

The view of the Government of India was entirely rejected by the Duke of Argyll in his dispatch, dated 24 November 1870. One great principle underlying the whole system, wrote the Secretary of State, was 'that the final control and direction of the affairs of India rest with the Home Government, and not with the authorities appointed and established by the Crown, under Parliamentary enactment, in India itself.

'The Government established in India is (from the nature of the case) subordinate to the Imperial Government at home. And no Government can be subordinate unless it is within the

[1] Secretary of State's Dispatch to the Government of India, Legislative, No. 8 of 18 March 1869. Vide *Parliamentary Papers*, 1876, vol. 56, p. 22.

[2] Government of India's Dispatch to the Secretary of State, Legislative, No. 1, dated 22 March 1870. Vide ibid., pp. 23-4.

[3] ibid., pp. 23-4.

power of the Superior Government to order what is to be done or left undone, and to enforce on its officers, through the ordinary and constitutional means, obedience to its directions."[1]

There was no real difference, he stated, whether the direction related to legislative or to executive affairs. 'It may be quite as essential, in order to carry into effect the views of the Imperial Government . . . that a certain measure should be passed into a law, as that a certain act described . . . as executive should be performed.'[2] To limit the Home Government's right of interference in the sphere of legislation to the veto on Indian Acts would, he pointed out, enable that Government to prevent the passing of an injurious law ; but it would not be in a position to secure the enactment of a measure which it might think necessary for the safety or welfare of India.

He stated emphatically that the Home Government 'must hold in its hands the ultimate power of requiring the Governor-General to introduce a measure, and of requiring also all the Members of his Government to vote for it'.[3]

He, however, conceded that the Secretary of State's undoubted powers of control 'must indeed be used with great deliberation, and on the rarest occasions'.

(*3*) In a dispatch[4] dated 31 March 1874, Lord Salisbury complained that the Government of India had not informed him in time of a number of important enactments. Accordingly, he laid down the following rules to be observed by the Government of India regarding all intended legislative measures which were at the same time of importance and were not urgent :

When the Governor-General in Council accepted the principle of a particular measure and decided to submit it to the Legislative Council, a dispatch was to be addressed to the Secretary of State, stating at length the reasons therefor.

[1] Dispatch of the Secretary of State to the Government of India, Legislative, No. 47, dated 24 November 1870. Vide *Parliamentary Papers*, 1876, vol. 56, p. 26.

[2] ibid., p. 26.

[3] ibid., p. 26.

[4] Secretary of State's Legislative Dispatch, No. 9, of 31 March 1874, to the Governor-General in Council. ibid., pp. 27-8.

A copy of the draft Bill was to accompany the dispatch, or follow it as quickly as possible. Further, in case of material change during passage through the Legislative Council, the progress of a Bill was to be delayed until the Secretary of State had an opportunity of expressing his opinion on the change effected.[1]

The degree of importance or of urgency justifying application or non-application of the rule was left to the discretion of the Governor-General.[2]

In reply to the above Dispatch, Northbrook's Government assumed that the Secretary of State did not contemplate the examination and criticism of the drafts of Bills on points of form or detail and that only their general object and scope would form the subject of correspondence.

They objected to the rule regarding proposed legislation in the provinces. The Governor-General had wide statutory powers regarding provincial legislation; the Secretary of State and the Government of India might act differently. Moreover, it was inexpedient, upon general grounds, to place restrictions upon the direct power to control and guide the proceedings of the local legislatures, which the existing law and practice entrusted to the Governor-General or the Government of India.[3]

To this Lord Salisbury replied that possession of information by him would not diminish the power of the Governor-General, vested in him by law, in respect of legislative proposals of the provincial governments. He agreed, however, to state his objections, if any, to proposals of provincial legislation to the Government of India and not to the provincial governments.[4]

Controversy between Lord Salisbury and Lord Northbrook's Government on the question of previous sanction became acute in 1875 in respect of the tariff legislation of that

[1] These directions were to apply, *mutatis mutandis*, to provincial legislation.

[2] Should previous reference be dispensed with on the ground of urgency, the Governor-General was required to communicate to the Secretary of State subsequently the grounds of the opinion on which he had acted.

[3] Government of India's Dispatch to the Secretary of State, Home Department, Public, dated 28 July 1874. Vide *Parliamentary Papers*, 1876, vol. 56, pp. 29-30.

[4] Secretary of State's Dispatch to the Government of India, Legislative, No. 33, dated 15 October 1874. Vide ibid., pp. 31-2.

year. On 5 August 1875, Lord Northbrook wired to the Secretary of State that the Tariff Act had been passed that day.[1] On 7 August Salisbury wired back to say that some of the provisions of the Act were objectionable and inquired why his previous sanction had not been obtained.[2]

In reply the Government of India wrote that they did not consider that the Act in question should have been referred, for the matter was urgent. They also stated that their action was in conformity with previous practice in respect of customs duties.[3]

Replying, Lord Salisbury observed : 'By "urgency" it was not my intention to express the state of things in which an earlier is preferable to a later passage of a proposed measure ; I rather intended to indicate those measures which could not be delayed without serious public evil.'[4] For future guidance, the Governor-General was directed without delay to communicate by telegram his intention of withdrawing on the ground of urgency a measure from the operation of the rule of previous sanction.

This controversy related to the question of import duties on Lancashire cotton goods. Salisbury urged the abolition of these duties in order to satisfy the British manufacturers. The Government of India took elaborate exception to the dictation of tariff legislation by the Home Government. 'After carefully examining the records of the Government of India since the year 1859,' stated the dispatch of 25 February 1876,[5] 'we can find no precedent of a measure so seriously affecting the future of Indian finance as the prospective removal of a tax which brings in a revenue of £800,000 per annum having been directed by the Home Government.' In a later dispatch[6] the Government of India pressed for the

[1] Vide *Parliamentary Papers*, 1876, vol. 56, p. 486.

[2] Vide ibid., p. 487.

[3] Government of India's Dispatch to the Secretary of State, Home Department, Public, dated 16 August 1875. Vide ibid., p. 549.

[4] Secretary of State's Dispatch to the Government of India, Legislative, No. 51, dated 11 November 1875. Vide ibid., pp. 551-3.

[5] Dispatch of the Government of India to the Secretary of State, Finance Department, No. 3 of 25 February 1876. Vide ibid., p. 565.

[6] Government of India's Dispatch to the Secretary of State, Home Department, No. 9 of 17 March 1876. Vide ibid., pp. 582-5.

withdrawal of the rules regarding legislation, recently laid down by the Secretary of State. These rules, they stated, would greatly change the previous practice, for, while in regard to many descriptions of legislative measures, there had been much previous consultation between the Government of India and the Secretary of State in Council before their introduction, in regard to others the responsibility of introducing them without such previous consultation had so long always devolved upon the Government of India. They maintained that measures affecting the customs tariff fell under the latter category. In support of their claim they cited a long array of eleven Acts passed since 1859 which altered the customs tariff but were never referred to the Secretary of State for previous approval. 'While from time to time the expediency of dealing with particular duties has been brought by the Secretary of State to the attention of the Government of India, the responsibility of making changes in the customs tariff has hitherto invariably been left to this Government.'[1] 'A similar course', they continued, 'has been followed, so far as we are aware, with regard to all other measures affecting the finances of India. Bills imposing taxes have been constantly introduced without previous reference to the Secretary of State.'[1] They accordingly requested that the rules should be so interpreted as to exempt measures affecting finance and customs which had hitherto been dealt with on the responsibility of the Government of India from the rule that required legislative measures to be referred to the Secretary of State before they were introduced, and that it might be understood that the existing practice of leaving in all ordinary cases the initiation of other legislative measures to the Government of India would not be disturbed.[2]

Lord Salisbury's reply was addressed to Lord Lytton's Government, for in the interval Northbrook had resigned. Regarding the cases cited by the Government of India he observed: 'The period over which they extend is too brief to invest with authority any practice which would not, without such sanction, equally recommend itself on reasons of mere

[1] Vide *Parliamentary Papers*, 1876, vol. 56, pp. 582-5.
[2] ibid., p. 585.

expediency.'[1] He added that their introduction was preceded by full demi-official communication between the Viceroy and the Secretary of State. No inference, therefore, as to the independence of the Government of India in respect to that class of questions could be drawn from the absence of official communication.[2]

Lord Salisbury pointed out the practical difficulties in the use of the right of disallowance. 'By this plan the greatest publicity and the strongest emphasis are given to the divergence of opinion between the Home and Indian Governments. It appears to me that, for the purpose of sustaining the dignity and position of the Governor-General, it is far better that the views of Her Majesty's Government should be intimated in the way of discussion to the Indian Government, before the latter has publicly pledged itself, than that Her Majesty's Government should be forced to convey them in the form of open condemnation, which is implied by the act of disallowance.'[3] The use of disallowance was specially inconvenient in respect of financial measures; for the intimation of such disallowance would take two or three months and would frustrate legitimate expectations. The acceptance of the procedure suggested by the Government of India would place the Home Government in a dilemma in respect of financial measures about which the two Governments differed. Her Majesty's Government 'must either [by disallowance] inflict upon the trading community severe loss and disappointment; or they must defend in Parliament—in other words, they must pretend to approve that of which, in fact, they disapprove'.[4] The proposal of Northbrook's Government, remarked Lord Salisbury, was, in effect, that the Government and the Legislative Council of India should enjoy the same amount of independence ('full discretion, subject to disallowance') in respect of financial measures as was enjoyed by the elected Assemblies and responsible Governments of the self-governing Colonies. This was clearly inadmissible both by reason of the constitution of

[1] Secretary of State's Dispatch to Government of India, Legislative, No. 25 of 31 May 1876. Vide *Parliamentary Papers*, 1876, vol. 56, pp. 596-601.
[2] ibid., pp. 596 ff.
[3] ibid.
[4] ibid.

the Government and Legislature in India and the nature and extent of the responsibility imposed by Parliament on the Home Government.

Rejecting the request of Northbrook's Government in respect of financial measures, Lord Salisbury said that Parliament took more interest in these than in any other question of Indian administration, and that these measures affected other than Indian interests and related to matters on which Her Majesty's Government was in constant negotiation with foreign powers. Indeed, greater control in the initial stages was more necessary in this than in other spheres.

The Secretary of State emphasized, however, that there was no intention to disturb the existing practice whereby the Government of India ordinarily had initiative in legislation. And his instructions, it was added, left the Governor-General as free as he had ever been before ' to act at once, in any way which a public emergency may seem to him to demand '.[1]

(4) *Controversy over the question of Cotton Excise Duty in 1894*

The issue was again raised prominently in 1894 over the question of the cotton duties. Sir Henry Fowler, Secretary of State, laid it down that ' when a certain line of policy has been adopted under the directions of the Cabinet, it is the clear duty of every Member of the Government of India to consider, not what that policy ought to be, but how effect may best be given to the policy that has been decided upon ; and, if any Member of that Government is unable to do this, there is only one alternative open to him '.[2]

The *raison d'être* of the Secretary of State's control over Indian legislation was explained long ago in a Minute by J. S. Mill.[3] He ridiculed the scheme of governing a dependency under which the governing country should neither retain the government in its own hands, nor resign it or any part of it to the people of the dependency, but should

[1] Vide *Parliamentary Papers*, 1876, vol. 56, pp. 596 ff.

[2] Letter to Lord Elgin, Governor-General of India. Vide R. Hamilton, *The Life of Lord Wolverhampton* (*formerly Sir Henry Fowler*), pp. 315-16.

[3] Presumably it was written in the context of the controversy regarding the drafts proposed by the Indian Law Commissioners. Vide *Parliamentary Papers*, 1876, vol. 56, pp. 32-3.

make it over to a small number of individuals sent out from the governing country, to be exercised at their discretion, under no control or responsibility except the power of recall. He took it for granted that Indians were not then fit for taking any share in their own government. The governing country was, therefore, bound to exercise control over those ruling in India. Of course, the Home authorities were not to interfere minutely or vexatiously with the acts of their agents. The local authorities, he said, were not to be allowed either to do what to the Home authorities clearly appeared to be wrong, or to leave undone what to them clearly appeared to be right. The Indian authorities, wrote Mill, recognized the right of disallowance but asserted the right of refusing to legislate notwithstanding the commands of the Home authorities. 'The legislative power is as much more important than the administrative, as the whole exceeds in importance a part of itself. If you have not the control of the legislation in India, you have not that of its administration. If the pretensions of the Council are admitted, there will be no real controlling authority over the Government of India except Parliament; and what capacity Parliament has for exercising such a control!'[1]

From the above narrative it becomes evident that the subordination of the Government of India to the Secretary of State was complete and the control of the Secretary of State extended to every sphere of government, administrative, legislative and financial. The repeated attempts of the Government of India to establish a claim to greater independence in the sphere of legislation proved entirely unsuccessful. This control was not only complete in theory, but it was also very extensive and effective in practice. As the authors of the Report on Indian Constitutional Reforms, 1918, put it: 'All projects for legislation, whether in the Indian or provincial legislatures, come Home to the Secretary of State for approval in principle. Before him are laid all variations in taxation or other measures materially affecting the revenues and in particular the customs; any measures affecting the currency operations or debt; and, generally speaking, any proposals which

[1] *Parliamentary Papers*, 1876, vol. 56, pp. 32-3.

involve questions of policy or which raise important administrative questions or involve large or novel expenditure. To set out all the Secretary of State's specific powers would be a long task : but we may mention the construction of public works and railway ; the creation of new appointments of a certain value, the raising of the pay of others, or the revision of establishments beyond a certain sum ; grants to local Governments, or loans to Native States ; large charges for ceremonial or grants of substantial political pensions ; large grants for religious or charitable purposes ; mining leases and other similar concessions ; and additions to the military expenditure, as classes of public business in respect of which he has felt bound to place close restrictions upon the powers of the Governments in India."[1] In practice it was, of course, impossible to administer a vast and distant country directly from Whitehall, and large powers and responsibilities were always left by the Secretary of State to the Government of India.[2] Yet the Secretary of State's responsibility to Parliament set very practical limits to the extent of delegation to Indian authorities.

In view of His Majesty's Government's declared policy of developing responsible government in India, Parliament, the authors of the Report observed, should set a bound to its own interference in the internal administration of India. The Secretary of State, they suggested, should cease to control the administration of the transferred subjects in the provinces.[3] Even as regards reserved subjects, ' while there could not be any abandonment by Parliament of ultimate powers of control, there should . . . be such delegation of financial and administrative authority as will leave the Government of India free, and enable them to leave the provincial Governments free, to work with the expedition that is desirable '.[4] In the financial sphere, they suggested the examination of the existing

[1] *Montagu-Chelmsford Report*, par. 36.

[2] cf. ' Delegation has been carried out largely as a matter of expediency, with the direct object of increasing administrative efficiency ; it has not implied, and has not been intended to imply, any radical change in the respective functions of the authorities between whom it has taken place. The Secretary of State in Council retains the ultimate authority as the head of the system.' *Crewe Committee Report*, par. 12. Cmd. 207 of 1919.

[3] *Montagu-Chelmsford Report*, par. 291.

[4] ibid., par. 292.

codes and regulations and orders on the subject. In respect of administrative matters there were no similar general orders. Important matters had to be referred to the Secretary of State. 'The drawing of the line between important and unimportant can only be left to the common sense of the authorities in India and at Home. But we are agreed that a wider discretion ought henceforth to be left to the Governor-General in Council, and that certain matters which are now referred Home for sanction might in future be referred Home merely for the information of the Secretary of State in Council.'[1] They recommended that the Secretary of State should be authorized, by rules to be laid before Parliament, to divest himself of control over the Government of India in some specified matters, even though these continued to be the concern of the official Governments, and to empower the Government of India to do the same in relation to provincial Governments. There would, of course, be no delegation in respect of large matters of policy in reserved subjects.[2]

Discussing the effect of the Reforms scheme on the Central Government, the Crewe Committee observed that a substantial non-official majority in the Assembly was bound to make its weight felt with the Government of India. In order that the Assembly's opinion might carry corresponding weight with the authorities who controlled the Government of India, the Committee recommended the acceptance of the principle that where the Government of India agreed with a conclusion of the Legislative Assembly, their joint decision should ordinarily prevail. This principle, they said, was really involved in the conception of the Reforms.[3]

Applying this principle to legislation, they suggested that the procedure for securing essential legislation over the head of the Legislative Assembly should not be resorted to by the Government of India, except in cases of absolute necessity, without the previous approval of its substance by the Secretary of State. Evidently they expected the Secretary of State to act

[1] *Montagu-Chelmsford Report*, par. 292.

[2] It will be seen that they proposed material alterations in the functions of the India Office.

[3] *Crewe Report*, par. 13.

as a check on the Government of India. It was most unlikely, however, that a Secretary of State would uphold the view of the Legislative Assembly, as against the considered judgement of the Government of India. Further, they recommended that whenever legislation had the support of a majority of the non-official members of the Assembly, the Secretary of State should refuse assent only when he thought it necessary to do so in the interests of the peace, order and good government of India, or of Imperial policy.

In respect of resolutions on the Budget[1] or on general administration, which reflected a joint decision of the Government of India and a majority of the non-official members of the Legislative Assembly, the Secretary of State was to be guided by the principle just stated in case reference was made to him.[2]

On the question of delegation, the Committee observed : ' Without prejudice to the further relaxation of control by the Secretary of State, the principle of previous consultation between the Secretary of State and the Government of India should be substituted in all cases where the previous sanction of the Secretary of State in Council has hitherto been required.'[3]

This recommendation was to apply to all projects, both legislative and financial, subject to such reservations as might be necessary for the proper discharge of the Secretary of State's ministerial responsibilities. There was no need for similar delegation in regard to purely administrative questions. ' The administrative powers of the Government of India in this respect are not limited by any formal restrictions ; but as a matter of constitutional practice, reference to the Home authorities is of course made on what are understood to be specially important administrative matters.'[4] They agreed that the practice should be continued under the new system, but suggested that the degree of discretion allowed in matters of pure administration should be enhanced in general

[1] Under the Montagu-Chelmsford scheme the Legislative Assembly could express its views on the Budget only by means of resolutions.

[2] *Crewe Report*, par. 16.

[3] ibid., par. 17.

[4] ibid.

correspondence with the wider authority to be allowed in future in matters of legislation and finance.[1]

In respect of provincial action coming under his cognizance, the Secretary of State was to be guided, *mutatis mutandis*, by the principles already stated.[2]

The essential feature of the situation under the Reforms scheme, wrote Professor Keith, was the 'deliberate and honourable acceptance of the view that, if the Government of India has the support of the representatives of the people, it lies with those who advise interference [by the Secretary of State] to make out a substantial and grave cause of interference'.[3] On the other hand, if the Government of India felt it necessary to ignore the wishes of the Legislative Assembly, there would rest on them the burden not merely of satisfying the Secretary of State of the advisability of their action, but also that causes existed which justified them in insisting upon carrying it out, despite the wishes of the Assembly. 'The Government of India will thus have every reason to bring its action more and more into accord with Indian feeling, while retaining its official character, and a real, if modest, step will have been taken towards the consummation of the ideal set in the declaration of 20th August 1917.'[4]

On the subject of the relations of the Secretary of State with the Government of India, and through it with the provincial governments, the Joint Select Committee of 1919 observed :

'In the relations of the Secretary of State with the Governor-General in Council the Committee are not of opinion that any statutory change can be made, so long as the Governor-General remains responsible to Parliament, but in practice the conventions which now govern these relations may wisely be modified to meet fresh circumstances caused by the creation of a Legislative Assembly with a large elected majority. In the exercise of his responsibility to Parliament, which he cannot delegate to anyone else, the Secretary of State may reasonably

[1] *Crewe Report*, par. 17.
[2] ibid., par. 18.
[3] ibid., Minority Report by A. B. Keith, par. 4.
[4] ibid., par. 5.

consider that only in exceptional circumstances should he be called upon to intervene in matters of purely Indian interest where the Government and the Legislature of India are in agreement.'[1]

Dealing with one special case, the fiscal policy of India, the Committee recommended the acceptance of a convention that 'the Secretary of State should as far as possible avoid interference on this subject when the Government of India and its Legislature are in agreement, and they think that his intervention, when it does take place, should be limited to safeguarding the international obligations of the Empire or any fiscal arrangements within the Empire to which His Majesty's Government is a party.'[2]

[1] *Report of the Joint Select Committee of Parliament on the Government of India Bill*, 1919. See comment on Clause 33 of the Bill.

[2] Vide *Report of the Joint Select Committee of Parliament on the Government of India Bill*, 1919. The relation of the Secretary of State and the provincial governments in respect of the reserved subjects was to be governed by similar principles. But the control over transferred subjects was to be restricted within the narrowest possible limits. Vide ibid.

Commenting on the draft Rule under Sec. 33 of the Act of 1919, the Joint Select Committee remarked that it was confined to relaxation of the Secretary of State's control over transferred subjects, and that they considered that no statutory divestment of control, except over the transferred field, was either necessary or desirable. It was open to the Secretary of State to entrust large powers, administrative and financial, to the Governor-General in Council and the Governors in Council. This would, however, be only delegation of his authority and his accountability to Parliament would remain. See *Second Report on Draft Rules*, par. 5.

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THE GOVERNMENT OF INDIA AND THE SECRETARY OF STATE FOR INDIA

(continued)

UNTIL January 1921, when the Act of 1919 came into force, the control of the India Office over the Governments in India was in law absolute and all-embracing,[1] though, of course, extra-legal conventions mitigated this control in some degree. In theory, the position was very slightly affected by the Act of 1919. The only change that it made was the addition of the words 'or rules made thereunder' after 'this Act' in Sub-Sec. 2 of Sec. 2. And the general powers given by Sec. 2 were specifically controlled by Sec. 19A which authorized the Secretary of State in Council to make rules to 'regulate and restrict the exercise of the powers of superintendence, direction and control vested in the Secretary of State and the Secretary of State in Council . . . in such manner as may appear necessary or expedient in order to give effect to the purposes of the Government of India Act, 1919'.

In spite of the wide freedom given by this Section, the sole use made of this power was the framing of a Rule limiting the right of superintendence, etc., of the Secretary of State in Council in the sphere of provincial transferred subjects to certain specified purposes. But the legal powers of the Secretary of State to control the Government of India in the exercise of all their functions, and the provincial governments in their administration of reserved subjects, remained in theory practically what they were before the Act of 1919 came into

[1] Legally, Indian revenues formed 'an undivided and indivisible corpus', and the Secretary of State in Council had complete control over the expenditure thereof for the purposes allowed by the Act.

force. Certain new powers were, of course, conferred by that Act upon the Governor-General and the Governors, such as the power of certifying Acts or authorizing expenditure. During the initial period of the operation of the Reforms there was a controversy between the Government of India and Whitehall as to whether these statutory personal powers were subject to the Secretary of State's dictation. It was ruled by the Secretary of State that his control extended to the exercise of these personal powers as well, unless the Act clearly indicated a contrary intention. For instance, the exercise of the Governor-General's power of certification under Sec. 67B was under the control of the Secretary of State, but the power under the proviso to Sub-Sec. 2 of Sec. 67B was not, by reason of the use of the words 'where in the opinion of the Governor-General'. Such explicit savings, however, were extremely rare in the Act. Even so, the Secretary of State could in the last resort control the use of such powers indirectly, but quite effectively, by means of the weapon of recall. Their existence, therefore, did not materially affect the legal control exercisable by the Secretary of State over the Governments in India.[1]

The general powers of the Secretary of State were derived from Secs. 2 and 33, which were complementary. Sec. 2 provided :

'Subject to the provisions of this Act, the Secretary of State has and performs all such or the like powers and duties relating to the government or revenues of India, and has all such or the like powers over all officers appointed or continued under this Act' as were exercisable by the East India Company, or by the Court of Directors or Court of Proprietors, either alone or with the sanction of the Board of Control, or by the Board of Control alone. Thus the measure of the Secretary of State's powers was the measure of the powers of the above-mentioned bodies. In particular, the Secretary of State might, subject to the provisions of the Act or rules made thereunder,

[1] See *Indian Statutory Commission Report*, vol. IV, p. 94, memorandum by the Government of India ; and ibid., vol. V, p. 1576, memorandum by the India Office. It should be noted that the legal position of the Secretary of State in respect of the personal powers of the Governor-General and Governors has not been correctly stated in the India Office Note.

'superintend, direct and control all acts, operations and concerns which relate to the government or revenues of India, and all grants of salaries, gratuities and allowances, and all other payments and charges, out of or on the revenues of India'.

Sec. 33 required the Governor-General in Council 'to pay due obedience to all such orders as he may receive from the Secretary of State'.

The legal control of the Secretary of State, save in so far as it was restricted by statutory rule under Sec. 19A in respect of transferred subjects, was thus complete and all-embracing. And this was true not only in theory but also very largely in practice, as will be shown presently.

The Secretary of State and Indian Legislation

The Government of India Act did not specifically vest in the Secretary of State any appreciable control over Indian legislation. Sec. 65 (3) provided that the Indian Legislature could not, without the previous approval of the Secretary of State in Council, make a law empowering any court other than a High Court to sentence to death any European British subject or his children, or abolishing any High Court.

The other statutory power was in respect of the Crown's right of assent to, or disallowance of, Indian Acts. The Crown might disallow Acts of the Legislatures in India, Acts made by the Governor-General or Governors, ordinances made by the Governor-General and Regulations made by the Governor-General in Council. Further, its assent was required to reserved Bills, central or provincial, as well as to Acts made by the Governor-General or a Governor, unless these Acts were, on the ground of emergency, brought into operation by the direction of the Governor-General.

In spite of the paucity of specific provisions in the Act regarding the Secretary of State's control over legislation, he exercised in the past enormous control over it. This he did by means of extra-statutory instructions whereby the Secretary of State 'secured the submission of every Bill (with a few unimportant exceptions) for his previous approval'. The question of

these extra-statutory executive instructions was dealt with by Mr Montagu in his dispatch of February 1921.[1]

The position then existing was regarded by Mr Montagu as manifestly inconsistent with the intentions of the Act of 1919. Devolution and not centralization being the essence of that Statute, it was, in his opinion, necessary to effect material modification, if not the abrogation, of these extra-statutory instructions.[2]

The Secretary of State, therefore, laid down the following rules regarding reference of Provincial Bills :[3]

(*a*) That Local Governments were not bound to refer to the Government of India any Bills which did not come under the operation of Sec. 80A (3).[4] But if they desired to guard against the embarrassment due to eventual disallowance, they were at liberty to refer such Bills to the Government of India.

(*b*) That the Government of India were not required to refer to the Secretary of State any Bill submitted to them by Provincial Governments, 'but that within their discretion, and in order to guard against' the consequences of contingent disallowance, it was open to the Government of India to consult the Secretary of State on any such Bill.

(*c*) The Government of India were, however, required to refer to the Secretary of State for instructions any Bill submitted by a Local Government to the introduction of which the Governor-General proposed to withhold his sanction under Sec. 80A (3) or the introduction of which (in cases not covered by that Section) the Government of India regarded as undesirable.[5] Here the intention was to guard against too much interference by the Government of India in respect of provincial legislation.

With regard to Bills to be introduced in the Indian

[1] Secretary of State's Dispatch, Public, No. 24, dated 10 February 1921, to the Government of India, reproduced in *Statutory Commission Report*, vol. V, pp. 1599 ff.

[2] ibid., par. 4.

[3] ibid., par. 6.

[4] For which see Chap. 3, p. 44, ante.

[5] These principles were to apply to Bills relating to Transferred as well as Reserved subjects; though, in view of the Rules made under Secs. 19A and 45A, the occasions for references in respect of Bills on Transferred subjects would be necessarily limited. See Secretary of State's Dispatch, quoted above, par. 7.

Legislature the Secretary of State enjoined previous reference to himself of Bills relating to certain specified subjects. He was prepared, however, to dispense with reference for previous sanction, at the discretion of the Government of India, in the case of routine Bills, or Bills of minor importance, falling within those categories. The Government of India were given the option to consult the Secretary of State on other Bills which they regarded as of 'sufficient importance'.[1]

In respect of the extraordinary power of legislation vested in the Governors and the Governor-General by Secs. 72E and 67B respectively, Mr Montagu observed :[2] 'In view of the peculiar and personal responsibility which the Act imposes on the Secretary of State in respect of the confirmation of measures so enacted, I should naturally expect that the Governor or Governor-General, as the case may be, would rarely, if ever, omit to ascertain, when time permits, the views of the Secretary of State in advance of their certification, or, if emergency prevents this, to inform him fully, with the least possible delay, of the grounds of his action.'[3]

The previous approval of the Secretary of State, alluded to above, was required in respect of any Bill :[4]

(*a*) affecting the public debt or customs duties ;

(*b*) affecting the discipline or maintenance of any part of His Majesty's Military, Naval or Air Force ;

(*c*) affecting the relations of the Government with foreign Princes and States ;

(*d*) regulating any provincial subject or any part of a provincial subject which had not been declared by rules under the Government of India Act to be subject to legislation by the Indian Legislature ;

[1] Secretary of State's Dispatch, quoted above, par. 9.

[2] ibid, par. 10.

[3] In reply to a question in the Legislative Assembly, Sir A. Muddiman, Home Member, said : 'The Secretary of State has intimated that in this matter [certification under Sec. 67B] he prefers to rely on the discretion of the authority concerned as to whether there shall be any report for his previous approval before certification is resorted to rather than to issue rigid instructions.' Vide *Legislative Assembly Debates*, vol. IV, pt. IV, p. 2390. This, it is submitted, is not a correct paraphrase of the above instruction. In effect, the Secretary of State's instruction meant that his approval should be secured in all cases, except where there was a clear emergency which did not allow sufficient time to obtain such approval. The practice has undoubtedly been the same.

[4] Vide Secretary of State's Dispatch, quoted above.

(*e*) repealing and amending any Act of a local legislature passed after 1920 ;
(*f*) providing for the punishment of offences by courts not constituted under the Code of Criminal Procedure or conferring on the executive powers of interference with the personal liberty of the subject ;
(*g*) regulating merchant shipping other than shipping on inland waterways ;
(*h*) regulating the personal status and rights of European British subjects ;
(*i*) regulating naturalization ;
(*j*) affecting the currency ;
(*k*) altering the merchant law ;
(*l*) regulating the prerogative of the Crown.

'It is no exaggeration to say', observed the writer of the India Office Note,[1] 'that the attitude of the India Office towards Indian legislation as indicated in the dispatch . . . involved an almost revolutionary change. Now it is broadly true to say' he remarked 'that the control (as distinct from advice) over legislation exercisable by the India Office is confined to the potential exercise of the power of disallowance.'[2]

The effect of the change introduced by Mr Montagu's dispatch of 1921 was clearly exaggerated in this Note. The change was hardly a revolutionary one. Theoretically, it is of course true that, unlike in the past, after 1921 all Bills were not compulsorily referable to the India Office. Nevertheless, the Bills which were still required to be submitted for previous approval covered most of the important subjects of legislation. So the Secretary of State retained full control over proposals for legislation covering a very important and vital, if not as extensive an, area.

Moreover, the extent of optional reference was very wide indeed. As Sir T. B. Sapru, with his own inside knowledge, put it, 'So far as the Government of India is concerned, there is scarcely a piece of important legislation which is not

[1] This was one of the Memoranda submitted by individual officials of the India Office to the Simon Commission. It is entitled 'The Relationship between the India Office and the Government of India'. Vide *Simon Report*, V, pp. 1567 ff.

[2] ibid., par. 19.

previously reported to the Secretary of State . . . even when his previous sanction is not sought."[1]

The writer of the Note obviously underestimated the influence of the India Office when he stated that its control (as distinct from advice) over legislation practically dwindled into the potential exercise of the power of disallowance. Assuming this to be a correct statement of the position and remembering that there has not been a single instance of disallowance since 1921, the conclusion seems irresistible that the Government of India has been, broadly speaking, the effectual master in the field of legislation untrammelled by the superior authority of Whitehall. Any such inference is clearly untenable in the light of facts. The writer himself admits : ' Instances still occur, under para. 9 of the dispatch of February 1921, when proposals for legislation in the Central Legislature are sent to the India Office for previous approval, and (in important cases) when this Office is informed of and consulted on changes which have occurred, or are anticipated, in the form and policy of the measure during its passage ; and not infrequently during the past five years the India Office has found it necessary to advise, suggest or even to expostulate.'[2] This compulsory reference to the Secretary of State for previous sanction required by Mr Montagu's dispatch of February 1921, coupled with similar reference in certain other specific cases under other instructions or orders, secured to him the right, freely exercised, to control legislation in the initial stages without having merely to look on until the stage of veto came. Besides, important projects of legislation outside this compulsorily referable area were always communicated to him, either because the Government of India regarded it as their duty to keep the Secretary of State timely informed of such important matters or because they thought it expedient to ascertain his views at the start, lest they should find themselves, and put the Secretary of State, in an awkward situation if, in the end, he felt unable to acquiesce in the Act. The Secretary of State was not certainly in the habit of merely acknowledging receipt of such communications and thanking the Government of

[1] Sapru, *The Indian Constitution*, p. 25.
[2] op. cit., par. 19.

India for the same. In all important cases, and unimportant cases do not matter, he did express his own opinion, that is, the opinion of the India Office, and gave his advice. In theory, advice is not synonymous with control. But when advice is tendered by the Secretary of State who is the official superior of the Government of India, there is hardly any real difference between advice and control, especially when the power of disallowance is ever in the background. It is also necessary to bear in mind that, ever since the beginning of Government under the Crown, Secretaries of State have been extremely reluctant to exercise the veto. The reason that weighed most at the time of Sir Charles Wood or Lord Salisbury weighs as much, nay, even more, to-day. The Government of India is an official Government subject to the critical eye of a usually hostile Legislature and public. The India Office, whose presiding deity is nicknamed the Great Mogul at Whitehall, is suspect in the eye of the Indian people. To save the prestige of the Government of India and, what is more important, to save the Secretary of State from violent and bitter attack in India, it is essential that any public difference of opinion between the two should be scrupulously avoided. That is the main reason why the veto, often used in respect of Colonial legislation, has lain dormant in relation to Indian legislation. And that is also the reason why the Secretary of State's actual control over legislation has been so large and pervasive.

Even the power of legislation specifically vested in the Governor-General by the Act has been in practice subject to the Secretary of State's control. The certification of an Act over the head of the Legislature or the issuing of an Ordinance which is in fact an executive order, are matters of no small importance. The Governor-General will take good care to keep the Secretary of State informed of his action and to secure, in advance, his approval. For a certified Act, unless immediately brought into force, requires the assent of the King, and such Acts as well as Ordinances are subject to disallowance. Moreover, the Secretary of State is likely to be questioned about such matters in Parliament. He must, therefore, be promptly informed of such action and be able and willing to

defend it. The Secretary of State's instructions on certification have already been quoted. In respect of Ordinances also, except for sheer want of time, as in the case of the first Currency Ordinance of 1931, the Governor-General in practice always secures the previous approval of the Secretary of State.[1]

The Secretary of State's control over provincial legislation was much less. Still, through the Government of India which is in law and in fact subordinate to him, the Secretary of State exercised, 'though indirectly, to no small extent, control over the local legislatures also'.[2]

If the change, as we have argued, was not revolutionary, it is none the less true that it was appreciable. The extent of reference to the India Office perceptibly diminished, especially in respect of legislative proposals of comparatively minor importance, or on less important subjects. And over a large range of subjects, previous sanction was replaced by previous consultation. Possibly the more important change, though less easily definable, was the change of attitude of the India Office. Its attitude changed to a considerable degree from one of meticulous scrutiny of Indian legislative proposals to that of consideration of broad principles with increased deference to the wishes of the Government of India.

One reason for this change of attitude, stated the India Office Note, was the fact that, with the Governments in India in a minority in every Legislature, the India Office was no longer in the position to ensure the enforcement of positive orders, if it chose to issue them, unless it was prepared to proceed to the length of instructing the Governor-General to use his power of certification. Negatively, it could prevent the introduction of a Government Bill or enforce the withdrawal of one in progress, or threaten disallowance in the last resort. Any suspicion of 'interference from Whitehall' was warmly resented in India and there was a natural tendency to avoid giving cause for hostile criticism except under the stress of 'compelling necessity'.

It is undoubtedly true that as a result of the change in the

[1] cf. Lord Olivier's reference to the Bengal Ordinance of 1924 in the House of Lords on 31 March 1925.

[2] Sapru, op. cit., p. 25.

complexion of the Legislatures, the Governments in India had to show some spirit of accommodation[1] to the Legislatures, and consequently the India Office naturally had to allow them greater latitude than before. On the other hand, it must be noted that the outside world could at best suspect the influence of the hidden hand of Whitehall in any given case. For, whenever the Government of India takes a stand on any matter, it always gives the impression that the attitude is its own or is in conformity with its own view, and sedulously tries to hide from the Legislature and the public the existence of any dictation from Whitehall. Sometimes, but very seldom, the circumstantial evidence is too strong to convince people that there is no interference. Thus the Reserve Bank Bill of 1928 was dropped in circumstances which could leave no doubt that, although the voice was that of Sir Basil Blackett, the hand was that of the India Office. Even so, there was no admission of the fact by the Government of India.

The control by the India Office more usually takes the shape of preventing the introduction, or changing the contents, of Bills proposed to be introduced, rather than forcing the introduction of Bills which it considers necessary. Besides, normally the Secretary of State's directions are not couched in the form of orders, but rather in that of recommendation and advice. Even though the Governor-General in Council may resent an order, he may not be unwilling to carry out that order, if transmitted as an advice or a request.

In one very important matter which, by the way, was in the past the subject of acute controversy between the India Office and the Government of India, there has been remarkable slackening of the control of Whitehall. This is the fiscal policy of India on which the attitude of the India Office has since 1921 been governed by the well-known Fiscal Autonomy Convention. This Convention had its origin in the observations of the Joint Committee of 1919 on clause 33 of the Government of India Bill, 1919. A good deal of correspondence has since taken place between the Government of India and different

[1] This was done either by agreeing to changes in the Bill during its consideration or, more often, by trying to avoid provisions which were likely to evoke strong opposition.

Secretaries of State as to the limits and scope of the Convention. The nature of the Convention was in 1928 summarized by the writer of the India Office Note[1] as follows :

The India Office does not interfere with the enactment of a tariff measure which the Government of India and the Indian Legislature agree upon. But the Secretary of State as a Member of the Cabinet has the responsibility for ensuring that no such measure cuts across general Empire policy or is so unfair to any constituent part of the Empire as to bring India into conflict with that part. This responsibility the Secretary of State may fulfil by means of the Crown's veto. In order to avoid such an open conflict the Secretary of State requires, in advance, full information of the Government of India's intentions in regard to such legislation, before the Legislature is consulted and, therefore, before the Convention operates. The Government of India are bound to give every attention to any observations that the Secretary of State may make, but they are free ultimately to accept or reject such observations in deciding on the proposals to be eventually submitted to the Legislature. The Convention cannot be interpreted to mean that in respect of a fiscal measure if the Government of India can show that it was likely to be accepted by the Legislature, their duty to the India Office is satisfied by merely passing on information about its scope, and that the rights of the India Office to express views or opinions are *ipso facto* extinguished.[2]

The position of the Government of India *vis-à-vis* the Legislative Assembly in respect of this Convention, has sometimes given rise to sharp differences of opinion. The Cotton

[1] See par. 25 at pp. 1591 ff. of vol. V of the *Statutory Commission Report*.

[2] The actual working of the Fiscal Convention in respect of Tariff Board Reports, which have in practice been most of the occasions for its operation, was described by Sir Geoffrey Corbett, Secretary, Commerce Department, as follows : On receipt of a report from the Tariff Board, advance copies were sent to the Secretary of State. It was then considered and provisional conclusions were come to by the Government of India. These conclusions were then telegraphed to the Secretary of State for his observations. He then either made some observations or suggestions, or did not. The Government of India then considered his observations, if any, and reached final conclusions which were in due course placed before the Legislature. If these were accepted by the Legislature the convention came into play and the Secretary of State did not interfere. The Government of India as a whole considered the case before the Secretary of State's observations were asked for, and no final decisions were ever made without reference to the Secretary of State. Vide *Simon Report*, vol. XV, Q.16, 24, 25, and 77.

Textile Industry (Protection) Bill, 1930, for instance, occasioned much bitterness of feelings. The Government made it known at the outset that they would not proceed with the Bill if it were substantially altered. This placed many of the members of the Assembly on the horns of a dilemma, for, although they wanted material change in the Bill, they thought it wiser, in view of the threat, to vote for it. The Government's attitude was strongly resented by Pandit M. M. Malaviya, who said : 'The reality of the fiscal autonomy convention demands that, though the initiative for putting forward proposals of a legislative character, particularly proposals of taxation, rests with the Government of India, . . . once the proposals have been laid before the Assembly the Government of India should consider themselves bound to defer to the opinion of this House, . . . because this convention has been established to prevent a deadlock arising on such an occasion."[1]

This contention was refuted by Sir George Rainy as being in contravention of the responsibilities placed by law upon the Government of India. He, however, admitted that it was the duty of the Government of India to establish harmonious relations with the Legislature in this region, so far as it was possible.[2]

Under the Convention, when there is agreement between the Government of India and the Legislative Assembly, the Secretary of State, whatever his views, does not intervene, except that he may use the Royal veto to secure certain specified Imperial purposes. Where the two differ, the Convention ceases to operate and the Secretary of State resumes his power of control. Thus the fiscal autonomy belongs to the Government of India plus the Legislature, in effect, the Legislative Assembly. If, however, the Government of India takes up an attitude like the one they did on the Cotton Textile Protection Bill of 1930, they may reduce the Legislative Assembly into a dittoing body and the autonomy becomes in effect the autonomy of the Government of India.[3]

[1] *L.A.D.*, 1930, vol. III, p. 2631.

[2] Vide ibid., pp. 2557-8.

[3] This is hardly in conformity with the Viceroy's telegram to the Secretary of State, dated 12 February 1930, in which he observed: 'in a matter of this kind after frankly stating our case we should desire to elicit the most free expression of opinion from the Legislature with whom the final decision must rest.' Vide *House of Commons Debates*, 17 March 1930, vol. 236, col. 1682.

As to the influence of the Secretary of State on the decisions of the Government of India in fiscal matters, it is realized on either side that his remarks are merely observations, and he has never tried to force his views upon the Government of India. On the other hand, it is reasonable to assume that the constitution and status of the Government of India being what it is, any observations emanating from the India Office or from the Cabinet must carry great weight with the authorities in India. Besides, the Legislature has no means of knowing what were the original proposals of the Government of India and how far they were modified as a result of the Secretary of State's observations. If in these circumstances the Government of India act, as they did in 1930, the legislators and the public naturally suspect the influence of Whitehall, a possibility which it was the object of the Convention to avoid.

It has been stated before that the Secretary of State reserves to himself the right of intervention in certain circumstances. It is hard to discover any ' general Empire policy ' or to define what is meant by general international obligations of the Empire. India cannot be denied the freedom enjoyed in these respects by the Dominions. It seems fair to regard this sphere of action of the Secretary of State as largely of theoretical interest.

In fiscal matters the Secretary of State has, therefore, in practice no control except in so far as the Government of India yield to his moral influence or fail to carry the Legislature with them.[1]

Financial Control

The Secretary of State was in theory responsible to Parliament for all expenditure from Indian revenues. Under Sec. 21 of the Government of India Act, the expenditure of the revenues of India was subject to the control of the Secretary of State in Council.

This control was, however, subject to the provisions of the Act or any rules made under it. Sec. 67A was a provision of the kind referred to.[2] Under it, the estimated annual

[1] The Fiscal Convention has been regarded as a growing and not static one.
[2] This provision is still in force under Sec. 317 (1) of the Act of 1935.

expenditure and revenue of the Governor-General in Council are to be laid every year before the Indian Legislature. Proposals for expenditure on certain specified heads are not submitted to the vote of the Legislative Assembly. All other proposals of expenditure are submitted to the vote of the Legislative Assembly which may give its assent or refuse it to any demand or reduce it by a reduction of the whole grant. In case the Assembly refuses or reduces a demand, the Governor-General in Council may restore it.

In view of Sec. 67A, the question arises: how far was the control of expenditure legally vested in the Secretary of State in Council and how far was it shared with the Indian Legislatures?

The requirement of the submission of the proposals for appropriation to the vote of the Legislative Assembly and the practical difficulty of scrutinizing the great mass of the expenditure of the Government of India, made it necessary to delegate large powers of initiative to the Government of India. Accordingly, the rules regarding previous sanction of expenditure were relaxed so as to require such sanction in a limited class of cases. It was, however, understood that plans involving important questions of policy should not be initiated without previous consultation with the Secretary of State. In view of the fact that the Secretary of State was in law responsible to Parliament for all expenditure from Indian revenues, his control over the Finance Department of the Government of India was very close. Thus he controlled the Budget,[1] ways and means operations, currency and exchange and borrowings in London. Quite clearly, the India Office kept and still keeps its firm control over all the vital matters of finance and currency, while it gave up control over minor matters.[2]

Administrative Control

In the administrative sphere there have never been any hard and fast rules. Apart from the Crown appointments, the

[1] cf. Sir Basil Blackett, Finance Member: 'All budget proposals are in accordance with the usual procedure referred to the Secretary of State in the first instance and approved by him before the budget is presented to the Assembly.' *L.A.D.*, vol. III, pt. VI, p. 4130. Before the Budget is formally communicated to the Secretary of State he is kept informed of its trend.

[2] cf. *Statutory Commission Report*, vol. V, p. 1652.

Secretary of State is responsible for the recruitment of all the key or security services ; his control over their recruitment, conditions of service, pay, pensions, etc., is very wide and effective.

'Apart from the question of appointments, the administrative control of the Secretary of State is exercised in many ways.' 'It is impossible here to refer to all those matters which are referred to the Secretary of State as a matter of practice or usage or by virtue of his directions conveyed in one way or another, though there is every reason to believe that the number of dispatches and cablegrams which pass between the Government of India or the Governor-General and the Secretary of State is amazingly large."[1]

On the subject of reference to the India Office, except in regard to legislation and expenditure, there have never been any well-defined rules. In respect of administration in general, it has not been found possible to frame a set of comprehensive rules which, without unduly restricting the liberty of action of the Governments in India, would enable the Secretary of State to be in a position to discharge his responsibility to Parliament. The accepted rule or understanding is that the Government of India should refer to the Secretary of State cases that ought to be referred. This rule, of course, leaves the position as vague as it would otherwise be. There are precedents for partial guidance, but they do not appear to have been collated. The Government of India are left to decide what ought to be referred. Often the Secretary of State himself would ask for information. The reference to the Secretary of State may be either for approval, previous or *ex post facto*, or for information. Sometimes a reference is made in order to secure the backing of the India Office in respect of a particular action ; sometimes it is made in order to see that the Secretary of State is in a position to answer criticisms in Parliament. This Parliamentary criticism, especially in the form of questions, does not always give him enough time to get the facts from India before answering it. Necessarily, therefore, the India Office expects that it should have timely information on all matter that might be agitated

[1] Sapru, op. cit., pp. 19-20.

in Parliament. The degree of insistence upon information naturally varies with the personal equation of the Secretary of State and the Governor-General, and ' with the varying degree of interest (and even to some extent with the party, personality and influence of the questioning Member or group) exhibited from time to time by Parliament '. This giving of information or the asking for it, is a potent means of indirect control over the Government of India. For, as has been rightly pointed out, when the seeker for information has the right to direct policy if he chooses, the request or demand for information ' is almost indistinguishable from superintendence and control '.[1]

It is therefore clear that the degree of control exercised by the India Office, directly or indirectly, openly or insidiously, has been very extensive and remarkable even under the Montagu-Chelmsford Reforms.[2]

The Relation between the Governor-General and the Secretary of State

The actual relation between the Governor-General and the Secretary of State is naturally a variable quantity depending mainly on the personal factor. So far as the constitutional relation is concerned, there have been many controversies in the past. Thus the issue was raised when Lord Northbrook was Viceroy and Lord Salisbury Secretary of State. As Lord Cromer, once Private Secretary to Lord Northbrook, put it :

' There can be no doubt that Lord Salisbury's idea was to conduct the Government of India to a very large extent by private correspondence between the Secretary of State and the Viceroy. He was disposed to neglect and, I also think, to underrate the value of the views of the Anglo-Indian officials. . . . This idea inevitably tended to bring the Viceroy into the same relation to the Secretary of State for India as that in which an Ambassador or Minister at a foreign Court stands to the Secretary of State for Foreign Affairs. . . . Lord Northbrook's general view was the exact opposite of all this, and I am strongly convinced that he was quite right. . . .

[1] *Statutory Commission Report*, vol. V, p. 1577.

[2] ' It is impossible ', says Sir Tej Sapru, ' to have an accurate idea of the degree and extent of his indirect control without a personal knowledge of the working of the administrative machinery.' *The Indian Constitution*, p. 29.

He recognized the subordinate position of the Viceroy, but he held that Parliament had conferred certain rights not only on the Viceroy but on his Council, which differentiated them in a very notable degree from subordinate officials such as those in the diplomatic service. He remarked, I may note, in one of his letters to a friend : " I do not look upon myself as a departmental officer and must judge for myself" . . .'[1]

In the course of his speech introducing the Indian Budget in the House of Commons on 26 July 1910, Mr Edwin Montagu, then Under-Secretary of State for India, said :

'The relations of a Viceroy to the Secretary of State are intimate and responsible. The Act of Parliament says : " That the Secretary of State in Council shall superintend, direct, and control all acts, operations and concerns which in any way relate to or concern the government or revenues of India, and all grants of salaries, gratuities and allowances, and all other payments and charges whatever out of or on the revenues of India."

'It will be seen how wide, how far-reaching, and how complete these powers are. . . . Lord Morley and his Council, working through the agency of and with the help of Lord Minto, have accomplished much.'[2]

This agency theory was controverted by Sir Valentine Chirol. He pointed out that the Section of the Act of Parliament was wrongly quoted by Mr Montagu who used the word 'shall' in place of 'may'. The difference between 'shall' and 'may', said he, was vital : the one implied that the Secretary of State was standing over the Viceroy in everything he did ; 'may' simply reserved to him the right of control where he disapproved. 'Shall' implied an agency of an inferior order ; 'may' safeguarded the rights of the Crown and Parliament without impairing the dignity of the Viceregal office.

On the merits of the question, Chirol's objections to the doctrine of 'agency' were : firstly, that it ignored one of the most important features of the Viceregal office, namely, that the Viceroy was the direct and personal representative of the

[1] B. Mallet, *Thomas George, Earl of Northbrook : A Memoir*, pp. 90-91.
[2] *House of Commons Debates* (Official Report), 1910, XIX, Coll. 1983-4.

King-Emperor. 'In that capacity, at any rate, it would certainly be improper to describe him as the "agent" of the Secretary of State.' Secondly, in his official capacity, especially in his relations with the Secretary of State, the Viceroy was not a mere individual, but the Governor-General in Council. Chirol, therefore, maintained that, on the one hand, Mr Montagu forgot the Crown when he talked of the Secretary of State acting through the agency of the Viceroy; and, on the other, he forgot the Governor-General in Council when he talked of the relation between the Viceroy and the Secretary of State.

Chirol admitted that the ultimate responsibility clearly rested with the British Government represented by the Secretary of State. As to the proper mode of discharging this 'ultimate responsibility', he held that the practice was for the Secretary of State to exercise general guidance and control, but the Executive Government of India was and must be seated in India itself. This, he observed, was very different from the relation of principal and agent adumbrated by Mr Montagu.[1] Lord Minto stated his reaction to the speech of Mr Montagu as follows:

'I had not realized that the Viceroy was merely an agent, and the Government of India apparently only a registry office! No one has ever for an instant doubted the supreme authority of the Secretary of State, but the Act which conferred that authority also vested in "the Governor-General in Council" the direct administration of all the machinery of Government. . . . I have no hope that you will agree with me."[2]

Criticizing Chirol's attack on the 'agency theory', Lord Morley wrote:[3] 'Nobody will dispute that the Cabinet are just as much masters over the Governor-General, as they are over any other servants of the Crown. The Cabinet, through a Secretary of State, have an inexpungable right, subject to law, to dictate policy, to initiate instructions, to reject proposals, to have the last word in every question that

[1] Chirol, *Indian Unrest*, ch. XXVI.

[2] Lord Minto's letter dated 18 August 1910 to Lord Morley. Vide Minto, *India, Minto and Morley*, p. 408.

[3] See Lord Morley's article entitled 'British Democracy and Indian Government' in the *Nineteenth Century and After*, February 1911.

arises, and the first word in every question that in their view ought to arise.

'Where the Secretary of State or the Prime Minister has to answer a challenge in Parliament on Indian business, he could not shield himself behind the authority of the Governor-General.' Lord Morley controverted the inference sought to be drawn from the fact that the Governor-General was also Viceroy. The Proclamation of 1858 and all the Warrants of Appointment made the authority of the Governor-General subject to the orders of the Secretary of State. The legal position of the Secretary of State was, in Lord Morley's view, admirably stated in the *Imperial Gazetteer of India*, namely, that he had 'the power of giving orders to every officer in India, including the Governor-General'.[1]

'I maintain', said Sir Tej Bahadur Sapru,[2] 'that the Governor-General, or the Governor-General in Council, are truly the servants of the Secretary of State, servants whose bounden duty it is to carry out the orders of the Secretary of State, which, in its turn, sometimes means the orders of the Secretary of State as suggested to him by his permanent staff.' The Government of India, he added, had to carry out the orders they received from Whitehall, even though they honestly believed that they were being led on a wrong path by the Secretary of State. Lest his contention should be challenged, Sir Tej said: 'Let the records in the India Office and in the archives of the Government of India, on some historic occasion, which will be within the recollection of Lord Reading and Lord Peel, . . . bear witness to my statement.'

Supporting the view of Sir Tej Bahadur,[3] Sir Md Shafi,[4] with his five and a half years' experience as a Member of the Executive Council, said that he had known instances in which the Secretary of State had overruled the unanimous decision of the Governor-General in Council, not only in regard to matters of high policy, but even in matters of internal civil

[1] See Lord Morley's article entitled 'British Democracy and Indian Government' in the *Nineteenth Century and After*, February 1911.

[2] Speech at the Federal Structure Sub-Committee of the Indian Round Table Conference on 2 January 1931. See *Proceedings*, p. 140.

[3] 'He [the Secretary of State] is in truth the Great Mogul,' said Sir Tej.

[4] ibid., p. 154.

administration in India. He referred to a list framed towards the end of 1922 of the cases in which the Secretary of State had interfered after the Montagu-Chelmsford Reforms were introduced. It was, he said, a somewhat lengthy list.

At times the Secretary of State sent orders as to how official Members should vote on a given motion. In reply to a question put by Lord Peel, ex-Secretary of State, if he had ever ordered official Members to vote in a certain way, Sir Tej Bahadur Sapru said, 'I did do it; and if I were at liberty to disclose things, Lord Peel, I would say that you made me do it on a very famous occasion. Lord Reading will bear me out that the whole of the Government of India was in the melting pot because of your orders.'[1]

Lord Reading[2] characterized the description of the Secretary of State as the Great Mogul in Whitehall as incorrect, though picturesque. His ground was that when the Secretary of State spoke, he did so as the representative of His Majesty's Government; he did not speak in his own voice. This contention of Lord Reading, correct so far as it goes, does not take away the substance of the argument on the other side. From a strictly constitutional point of view the Governor-General and the Governor-General in Council are, in spite of so many powers given to them by statute, definitely subordinate to the Secretary of State, either in Council, or in his individual capacity, or as the spokesman of the Cabinet and Parliament. Any other view is, constitutionally, futile. The fact that the Governor-General is also Viceroy gives him greater dignity, but does not at all affect his amenability to the control of the Secretary of State. The facts that the Governor-General occupies the highest office under the Crown outside the United Kingdom, that he is at the head of a Government controlling the destinies of such a vast and populous country, that he is the first citizen in India having a royal state of splendour, and that he has, by law, powers of wide extent and vital significance, do not alter the essential character of his relation to the Secretary of State. To adapt a well-known

[1] *Proceedings of the Federal Structure Committee of the 2nd R.T.C.*, on 15 September 1931, p. 29.

[2] *Proceedings of the Federal Structure Committee of the 1st R.T.C.*, on 5 January, 1931, p. 162.

expression, the Governor-General is indeed a lion, but under the throne of the Secretary of State.

A statement of the legal relation of the two high offices does not necessarily convey a true picture of the actual relation between the two. As the authors of the Joint Report put it, 'The relations between Simla and Whitehall vary also with the personal equation. If resentment has been felt in India that there has been a tendency on occasions to treat Viceroys of India as "agents" of the British Government, it is fair to add that there have been periods when Viceroys have almost regarded Secretaries of State as the convenient mouthpiece of their policy in Parliament."[1]

Apart from the question of the personal equation, there is one fact that gives the Governor-General a vital advantage over the Secretary of State in actual practice: he is the man on the spot and as such can claim to be more conversant with the actual atmosphere, conditions and things than the Secretary of State six thousand miles away. In certain matters, at any rate in respect of internal politics, he has a decided advantage and his views, if forcibly put forward, are almost always bound to prevail with any occupant of the chair at the India Office, whatever his own personal inclination and political affiliation. In this connexion it is interesting to note the correspondence that passed between Lord Morley and Lord Minto over the question of the detenus.[2] Lord Morley, a philosophical Radical, was utterly opposed to the Russian method of repression and it was with the utmost reluctance and after great searching of heart that he surrendered to the expostulations of Lord Minto in sanctioning the deportation of some suspected persons. Towards the end of August 1909, the Secretary of State seriously took up with the Viceroy the question of their release. He referred to the aversion of the rank and file of the Liberal party to indefinite detention and of the likelihood of some Unionists, like F. E. Smith and Percy, supporting a

[1] *Report*, par. 35. As St. John Brodrick (now Lord Midleton), then Secretary of State, put it, 'you will not believe it, but the Secretary of State practically abdicates his legal function and becomes George's [Lord Curzon's] ambassador at the Court of St. James.' Letter to Lady Curzon, dated 16 February 1904. Vide *Life of Lord Curzon*, vol. II, p. 344, by Ronaldshay.

[2] See Countess of Minto, *India, Minto and Morley*, ch. XXX.

move in Parliament against deportation. He suggested that the release of the deportees on the occasion of the announcement of the Reforms Regulations would create a good impression. Lord Minto in reply wrote that he and his Council were unanimously against Lord Morley's suggestion. In a private telegram of 27 October 1909, the Secretary of State quoted the view of the Cabinet in support of his previous suggestion. Lord Minto stuck to his position and on 31 October Morley wired : 'I earnestly hope that I am not to understand that you reject the unanimous suggestion of the Cabinet. Such a result would be most grave, and I am sure you will consider the situation with a full sense of responsibility, as I sincerely try to do.'[1] In his telegraphic reply of 2 November the Viceroy firmly reiterated the view of himself and his colleagues and ended with a significant threat : 'I have most carefully considered the situation and can only say that, with a full knowledge of conditions throughout the whole of India, the Viceroy and Government of India would be betraying the trust imposed upon them by His Majesty's Government if they now [changed their minds]. If His Majesty's Government decides upon the opposite course, the Viceroy and Government of India must accept their instructions, but they could not be held responsible for the results, and . . . I cannot conceive at the present moment anything more dangerous than that disregard should be had to the matured opinions of the Government of India and Local Governments.'[2] The result was instantaneous. On 3 November, Lord Morley wired back his acquiescence.[3]

If a Secretary of State with the temper and character of Lord Morley, pressed by a large Radical following in the House of Commons, acted like this, it goes without saying that no other occupant of that office would venture to do otherwise in respect of measures which the Viceroy considered necessary for maintaining law and order.[4]

In the relations between the Governor-General and the

[1] See Countess of Minto, *India, Minto and Morley*, p. 335.

[2] ibid.

[3] ibid., p. 336.

[4] The lessons of the régimes of two Labour Secretaries of State confirm this view.

Secretary of State extra-statutory private correspondence plays an important part. The practice of private correspondence goes back to the days of the Company when the Governor-General used to have regular private correspondence with the Chairman of the Court of Directors, and after the establishment of the Board of Control, with its President as well. The importance of this private correspondence becomes evident from the following remark of a former Permanent Under-Secretary of State for India. Referring to the irritation of Lord Curzon on being let down in the controversy with Kitchener, Lord Kilbracken (formerly Sir A. Godley) remarked that the Viceroy 'ceased to correspond privately with the Secretary of State or with any one else at the India Office, thereby making the Government of India impossible'.[1]

This correspondence is marked 'Private and Personal' in order to distinguish it from the official correspondence that takes place between the Secretary of State and the Governor-General. It is treated as confidential and no trace of it is left in Whitehall or in India when the two correspondents leave their respective offices.

Normally, this correspondence is supplementary to, and explanatory of, the official communications. On occasion, however, the limit is exceeded. During the Viceroyalty of Lord Minto and of his successor, Lord Hardinge, private correspondence largely supplanted official communications. The misuse of private correspondence at the time of Lord Hardinge came in for strong condemnation at the hands of the Mesopotamia Commission of 1917.[2] This Commission urged the desirability of restricting private communications between the Viceroy and the Secretary of State. 'Since the publication of the Report of the Mesopotamia Commission,' stated Sir William Vincent[3] (Home Member) in 1921, 'communications dealing with matters which require decision by the Governor-General in Council are official. When necessary they are supplemented by private and personal telegrams if His Excellency desires to place his personal views on any

[1] *Reminiscences*, p. 181.
[2] Cd. 8610 of 1917. See also Curzon, op. cit., vol. II, pp. 117-18.
[3] *Debates of the Council of State*, vol. I (1921), p. 84.

question before the Secretary of State.' It is doubtful if the scope and volume of private correspondence has diminished. It has, however, been more regularized.

Private correspondence takes the shape of regular weekly letters and frequent telegrams. Usually the Viceroy asks his Private Secretary to circulate extracts from private letters and telegrams received from the Secretary of State to the Departments for information and record. The idea is to keep the Members generally informed of the matters passing between the two. It is, of course, the Viceroy who decides how much of this private correspondence is to be disclosed to his colleagues.

For our present purpose, this private correspondence is significant for two reasons, namely (*a*) its effect on the personal relations between the Governor-General and the Secretary of State, and (*b*) its effect on the position of the Governor-General *vis-a-vis* the Executive Council.

In the first place, by means of this private correspondence the Governor-General and the Secretary of State get to know intimately each other's minds and to influence each other. As Lord Curzon put it, 'The true story of each Viceroyalty is in reality written in the weekly private letters which are exchanged between the Viceroy and the Secretary of State, and in which each unburdens himself in accents of explanation, advice, encouragement, warning, appeal, protest, or indignation, according as the situation may demand. Were these letters to be given to the world, the history of Viceroys might in some cases require to be entirely re-written.'[1] This correspondence 'would occasionally disclose a clash of personalities—a powerful Secretary of State influencing the Viceroy, and a strong Governor-General influencing the Secretary of State'.[2]

In the second place, this correspondence materially affects the relations of the Governor-General with his colleagues. It enables the Governor-General to keep the Secretary of State constantly informed of the progress of matters in his Council

[1] Curzon, op. cit., vol. II, p. 129.

[2] Sir Md. Shafi at a meeting of the Federal Structure Sub-Committee of the 1st Round Table Conference, held on 5 January 1931. See *Proceedings*, p. 155.

and especially of the trend of his own mind in respect of matters of importance. Though normally he acts as the spokesman of his Council, explaining and justifying its actions, and trying to secure the Secretary of State's approval thereof, it is also possible for him to influence the Secretary of State against his colleagues or some of them. Where an action of his Council does not commend itself to the Governor-General it is possible for him, whether deliberately or not, to influence the Secretary of State in favour of his own view. He has one great advantage over his colleagues. For, while Members of the Executive Council (except the Commander-in-Chief) very rarely correspond privately with the Secretary of State, the Governor-General always does. Moreover, should they have any such correspondence they must have the courtesy to show it to the Governor-General. But there is no impropriety in the Governor-General keeping his private correspondence a close secret.

'The result of these private and personal telegrams', remarked Sir Muhammad Shafi, an ex-Member of the Viceroy's Council, 'is that a day or two at least before a case is put up before a full meeting of the Executive Council, what must in fact amount to a previous decision has already been arrived at between the Secretary of State and the Governor-General.'[1] This may be an exaggeration ; but the possibility is there, and,

[1] See *Proceedings*, p. 155. Lord Reading found nothing wrong in this private correspondence. There was, he said, nothing clandestine in it and nothing which, if discovered, 'would expose the machinations of Government'. ibid., p. 162.

In a private letter to Lord Reading, then Viceroy, Lord Birkenhead, the Secretary of State, gave his motives for accelerating the appointment of the Statutory Commission. Referring to his speech in the Lords suggesting that it might be possible to accelerate the Commission, he wrote, '. . . we could not afford to run the slightest risk that the nomination of the 1928 Commission should be in the hands of our successors. You can readily imagine what kind of a Commission in its personnel would have been appointed by Colonel Wedgwood and his friends. I have, therefore, throughout been of the clear opinion that it would be necessary for us, as a matter of elementary prudence, to appoint the Commission not later than the summer of 1927. . . . I should, therefore, like to receive your advice if at any moment you discern an opportunity for making this a useful bargain counter or for further disintegrating the Swarajist Party . . .' Letter of 10 December 1925. Vide *Life of Birkenhead*, vol. II, p. 251, by his son, Lord Birkenhead.

One may confidently guess that the contents of this letter were not disclosed to his colleagues (at any rate his Indian colleagues) by the Viceroy. The letter is, by the way, an illuminating commentary on the sincerity and honesty of British politicians.

what is more important, the suspicion that this might in fact happen.

'The relations between the Secretary of State and the Viceroy', truly remarks Lord Kilbracken, 'are peculiar, and, if they are to be maintained on an agreeable footing, it is very desirable that both of these high officials should be endowed with an adequate amount of tact and of what M. Arnold called "sweet reasonableness."'[1] The actual position of the Viceroy in relation to the Secretary of State depends not only upon the personalities concerned but upon other factors as well. Their party affiliations, the place of the Viceroy in British politics, his relations with the Executive Council and with the Indian public, the complexion and inclinations of the House of Commons, all these factors have to be taken into account.

[1] *Reminiscences*, p. 179.

13

SOME EXTRAORDINARY POWERS OF THE GOVERNOR-GENERAL—A CRITICAL EXAMINATION OF THE USE THEREOF[1]

In this chapter a critical examination is made of the use of some extraordinary powers vested in the Governor-General by the Government of India Act, namely :

(A) his power of disallowing adjournment-motions,
(B) his power of legislation by certification, and
(C) his power of legislation by ordinance.

(A) *The Disallowance of Motions for Adjournment*

A motion for adjournment of the business of either Chamber of the Legislature for the purpose of discussing a definite matter of urgent public importance may be made with the consent of its President. But the Governor-General may, notwithstanding such consent, disallow any such motion ' on the ground that it cannot be moved without detriment to the public interest, or on the ground that it relates to a matter which is not primarily the concern of the Governor-General in Council '.[2]

This power of disallowance has been resorted to on many occasions. Up to March 1935, the power of disallowance was not exercised until after the President had admitted a motion for adjournment. On 5 March, however, the Governor-General took the unusual step of disallowing a motion for adjournment, standing in the name of Mr K. L. Gauba, before the President of the Legislative Assembly had the opportunity of considering its admissibility. This procedure was questioned in the Assembly, but Sir Abdur Rahim, the President, ruled that when notice of a motion for adjournment had been given, it was open to the Governor-General to disallow it at any stage.[3]

[1] The period covered is 1921-38.
[2] Indian Legislative Rules, No. 22 (2).
[3] Vide *Legislative Assembly Debates*, 1935, vol. II, p. 1670.

This precedent set up by Lord Willingdon was followed by him and his successor, Lord Linlithgow, in a number of cases. On 4 September 1936, the procedure being again challenged in the Assembly, Sir Abdur Rahim held that his previous ruling on the subject was wrong. 'The proper time', said he, 'at which the Governor-General is expected to pass an order, if he so chooses, disallowing a motion, notwithstanding that it has been consented to by the President, is after the consent of the President has been given.'[1] This is not only a correct interpretation of the Rule, but is also the proper course for the Governor-General to follow in the matter.

The manner of the exercise of this power of disallowance will become evident from the instances given below.

(1) On 25 January 1927, Mr S. Iyengar wanted to move the adjournment of the Assembly to discuss the action of the Government in sending Indian troops to China without consulting the Legislative Assembly. Sir A. Muddiman, Home Member, objected on the ground that this motion could not be discussed without reference to foreign relations, a subject which was outside the scope of debate in the Legislature. President Patel observed that he would see that the discussion was restricted to one single issue, namely, the action of the Government of India in agreeing to send Indian troops without reference to the Legislative Assembly, and that he would not allow any Member directly or indirectly to criticize the British Government's decision regarding military operations in China. He, therefore, allowed the motion. Lord Irwin disallowed it on the ground that its discussion was detrimental to the public interest.[2]

No really effective discussion on the subject was, of course, possible within the limits set by the rule barring discussion of foreign relations. This illustrates, incidentally, the severe limitation of the powers of the Legislature even by way of discussion and publicity. No great damage to the public interest could, however, have resulted from the discussion of the motion under the conditions laid down by the President.

(2) On 21 March 1929, Pandit Motilal Nehru wanted to

[1] Vide *L.A.D.*, 1936, vol. VI, pp. 451-2.
[2] Vide *L.A.D.*, 1927, vol. I, pp. 54, 76.

move the adjournment of the House to discuss the policy of the Governor-General in Council underlying the raids on several places and the arrest of public workers in several parts of India on the previous day. These arrests were in connexion with what came to be known as the Meerut Conspiracy Case. Sir B. L. Mitter, Law Member, raised objection on the ground that the matter was *sub judice*. This was overruled by President Patel on the ground that the policy of the action and not the merits of the cases were sought to be discussed. He clearly intimated that he would not allow any discussion of the merits of the cases. Lord Irwin, however, disallowed the motion under Rule 22 (2) of the Assembly Rules, on the ground of detriment to public interest.[1]

The arrests were carried out on a vast and spectacular scale. It was quite natural that the Opposition should raise the question. The Government would also have had an early opportunity of placing their point of view before the public, thereby allaying public suspicion. How the adjournment motion could be detrimental to public interest it is difficult to see, unless criticism of executive action is equivalent to public detriment.

(3) On 21 September 1931, an Ordinance was issued abrogating the obligation of the Government, under the Currency Act of 1927, to sell gold or sterling against rupees. This was done to meet the situation arising out of the abandonment of the gold standard by England on the same day. At the meeting of the Federal Structure Sub-Committee held on the 21st, Sir S. Hoare, however, announced that the rupee would be linked to sterling. On 22 September Sir C. Jehangir wanted to move the adjournment of the Assembly for discussing the Secretary of State's statement.

Sir G. Schuster, Finance Member, agreed that the motion clearly fell 'within the definition of those occasions which justify a motion for the adjournment of the House'.[2] He, however, argued that the discussion of the matter at that stage would be against the public interest. For in the course of debate opinions were bound to be expressed which might do

[1] Vide *L.A.D.*, 1929, vol. III, pp. 2277, 2298.
[2] Vide *L.A.D.*, 22 September 1931, pp. 825-6.

a good deal to disturb the atmosphere of confidence that was then necessary. He appealed to the mover not to press for a discussion. 'There is no desire on the part of this House', said Sir C. Jehangir, 'to embarrass Government. What we want to discuss is the statement made by the Secretary of State . . . and it is time that we gave expression to our views on a statement . . . which certainly deserves condemnation at the very first moment that this House gets an opportunity.'[1] Lord Willingdon disallowed the motion on the ground that it could not be moved without detriment to the public interest.[2]

The Government of India, like all bureaucracies and autocracies, fights shy of public discussion. The Finance Member's plea that such discussion would be against public interest was untenable. If the motion were allowed, the non-officials would have condemned what they regarded as the high-handed action of the Secretary of State and they would have argued that the action was prejudicial to Indian interests. It is difficult to believe that such comments would have led to speculation, etc. Similar comments had already been made in the Press and by Mr Gandhi at the Round Table Conference.

Besides, it must not be forgotten that, whatever might have been the reason, the whole procedure was unprecedented. The Legislative Assembly was created to give constitutional expression to public opinion for the benefit of the Government which was not in touch with it. Surely, when such conflicting steps were being taken in a matter most vitally affecting the life of the people, the Legislature should have been allowed to have its say. Shutting out of discussion on such occasions only serves to irritate non-officials and confirms the people's suspicion of the motives and actions of Government.

(4) On 4 February 1936, Mr A. C. Datta gave notice of an adjournment motion to discuss the lack of discipline in the King's Regiment as evidenced by the conduct of some soldiers of that regiment in the village of Benda, near Jubbulpore. Before the President took up the motion he was informed that the Governor-General had disallowed it, under Sub-Rule 2 of

[1] Vide *L.A.D.*, 22 September 1931, pp. 825-6.
[2] ibid., p. 839.

Rule 22, on the ground that it could not be moved without detriment to the public interest.[1]

The public mind was very much agitated over this matter. It was meet and proper that a prompt discussion of the incident should have taken place in the Legislature, so that Government might be in a position to explain the true state of affairs. The adjournment motion is meant for occasions like this. It seems a little mysterious how public interest would have suffered as a result of the debate.

It is pertinent to note that on a much less serious affair, namely the conduct of the police in the Savidge case, the adjournment of the House of Commons was moved and allowed.[2]

(5) On 30 September 1936, Mr Kazmi gave notice of an adjournment motion to discuss the failure of the Government of India to review its currency policy, and the maintenance of an appreciated value of the rupee in spite of the world-wide depreciation of currencies, chiefly brought about by the decisions of the European States. The President allowed the motion, but it was disallowed by the Governor-General on the ground that it could not be moved without detriment to the public interest.[3]

On 8 October 1936, Mr A. Ayyangar gave notice that he would move for the adjournment of the House to discuss the failure of the Government of India to revise its currency policy,

[1] Vide *L.A.D.*, 1936, vol. I, p. 122.

[2] Sir Leo Money and Miss Savidge were charged in the police court with improper behaviour. The Magistrate found the evidence flimsy and dismissed the case. Owing to the comments made by the Magistrate the Home Secretary instructed the Director of Public Prosecutions to inquire whether the two police officers concerned should not be prosecuted for perjury. In the course of the inquiry, Miss Savidge was taken to Scotland Yard where she was cross-examined by a police officer for five hours, ' in a manner suggestive of the American third-degree methods, with a view to extracting from her some confession incriminating herself and Sir Leo Money '. On 17 May, Mr Johnstone, a Labour Member, interrogated the Home Secretary on the case. In view of the unsatisfactory nature of the Minister's reply, Mr Johnstone asked leave to move for adjournment of the House. Leave was given and the matter was debated. See the *Annual Register*, 1928, pp. 50-1 ; *Parliamentary Debates* (*Commons*), 1928, vol. 217, coll. 1220, 1303 ff.

The allegations in the Savidge case could not stand comparison with those in the Benda case. Still, in India the matter could not be discussed in the public interest !

[3] Vide *L.A.D.*, 1936, vol. VIII, p. 2129.

in view of the devaluation of their currencies by Italy and other Western countries having trade relations with India. This motion was not disallowed by the Governor-General, and was therefore discussed.[1]

The differential treatment by the Governor-General of the two practically similar motions, with only a week's interval between them, cannot be explained on any clearly intelligible ground. If discussion on 30 September was likely to jeopardize public interest, presumably discussion on 8 October would have the same effect, for the international situation had hardly changed in the meantime. In fact, nothing untoward happened after the discussion on 8 October and nothing would have happened to the detriment of the public interest if the earlier motion were allowed to be discussed. The advisers of the Governor-General, to say the least, are often too cautious and too nervous.

(6) The Governor-General may disallow a motion for adjournment not only on the ground that the moving thereof is detrimental to public interest, but also on the ground that it relates to a matter which is not primarily the concern of the Governor-General in Council.

On the eve of the elections to the Provincial Assemblies to be constituted under the Government of India Act of 1935, a number of adjournment motions were sought to be moved to discuss the alleged interference in the elections by different Local Governments. All such motions were disallowed by the Governor-General on the ground that they related to matters which were not primarily the concern of the Governor-General in Council. In some of the cases the disallowance was quite justified. But when the allegation of tampering with elections was freely made in respect of a number of Provincial Governments, the subject surely assumed an all-India importance. The complaint was against Provincial Governments as constituted under the old Act. These were legally under the superintendence, direction and control of the Government of India which had the undoubted right to lay down general principles for the guidance of those Governments. It would, therefore, seem that in disallowing Mr Satyamurti's motion

[1] Vide *L.A.D.*, 1936, vol. VIII. p. 2668.

to discuss ' the failure of the Government of India to enforce strict neutrality on the part of Local Governments in respect of political parties and their propaganda for the ensuing provincial elections especially in the North-West Frontier Province ', the Governor-General was straining the provision of the rule.

The device of adjournment motion seeks to serve a very useful purpose in that it enables prompt discussion of matters of ' urgent public interest '. The Government are also given a good opportunity for explaining and defending the policy or action in question. It does, of course, dislocate the arrangement of the business of the House and that is why there are salutory restrictions on such a motion. The power of disallowance given to the Governor-General has no counterpart either in the British House of Commons or in the Dominion Legislatures. It is undoubtedly an exceptional power which should be used on really exceptional occasions. The manner in which the power of disallowance has been exercised makes one feel that, on the whole, the interests of the public and of the Government would have been better served if the Governor-General had used greater restraint in the exercise of this power. In this respect the advice of the Joint Select Committee of 1919 seems to have been forgotten. For that Committee, while securing to the Governor-General and the Governors the power in question, observed, ' The power to curtail public discussion in these newly-constituted legislative bodies will obviously call for great discrimination in its use if it is not to prejudice their success, and to result, not in closing discussion, but in transferring it to less appropriate channels.' They felt sure ' that the Governor-General and the provincial Governors will use their discretion in this matter wisely '.[1]

In the light of the cases considered in the preceding pages it is difficult to hold that the power has been used wisely or with proper discrimination. An executive discretion of this character ought obviously to have been most sparingly used. The net result of its exercise on most of these occasions has been to discredit the Legislature by giving colour to the Congress characterization of it as a sham, to cause irritation

[1] See *First Report on Draft Rules*, par. 17.

and suspicion in the minds of the legislators against the Government which surely did not otherwise possess enough of goodwill in its favour, and to transfer discussions of the subject-matters to the platform, the Press and private gossip.

(B) *The Governor-General's Power of Legislation under Section 67B*

The Montagu-Chelmsford Report postulated that 'the Government of India must remain wholly responsible to Parliament, and saving such responsibility, its authority in essential matters must remain indisputable.'[1] It was, therefore, proposed to give the Government of India power to secure its legislation and supplies should these be refused by the Legislative Assembly, which was to have a large elected majority. As regards legislation there was, of course, the ordinance-making power of the Governor-General. 'It merely provides, however, a means of issuing decrees after private discussion in the Executive Council, and without opportunities for public debate or criticism ; and normally it should be used only in rare emergencies.'[2] It was unsuitable for the purpose in view. There must be some means, for use on special occasions, 'of placing on the statute book, after full publicity and discussion, permanent measures to which the majority of members in the Legislative Assembly may be unwilling to assent'.[3] For this purpose deliberate departure was to be made from popular methods of legislation. Accordingly, the joint authors proposed the creation of a Council of State with a clear Government majority, which was to take part in ordinary legislative business and was to be the final legislative authority in matters which the Governor-General in Council regarded as essential.[4]

On this proposal the Joint Select Committee of 1919 observed :[5]

'The Committee have no hesitation in accepting the view that the Governor-General in Council should in all circumstances be fully empowered to secure legislation which

1 *Montagu-Chelmsford Report*, par. 190.
2 ibid., par. 276.
3 ibid.
4 ibid., par. 277.
5 Comment on Cl. 26 of the Government of India Bill, 1919.

is required for the discharge of his responsibilities ; but they think it is unworthy that such responsibility should be concealed through the action of a Council of State specially devised in its composition to secure the necessary powers. They believe that in such a case it would add strength to the Government of India to act before the world on its own responsibility.' In order that Parliament might know the circumstances leading to the enactment of laws by this means, they advised that all such Acts should be laid before it. The clause was accordingly altered and became Sec. 67B of the Act.[1]

Explaining the nature and the limitations of the power thus conferred upon the Governor-General, Mr Montagu said :

'It is not any measure which affects the interests ; it is a measure which the Viceroy can say is essential. He does not now, as he used to do, pass that legislation by means of . . . the " official block " ; he passes it frankly as an executive order of his Government.'[2] If so, it was surely inappropriate to give such an order the misleading name of an Act. Continuing, Mr Montagu said :

'It does not then become law until it has been before this House and the other House where any Member will have an opportunity of discharging his true functions as the trustee of the Indian electorate.[3] He will have, in order to deal with that subject, the opportunity of a report upon the measure by a Standing Committee appointed by this House itself. Therefore, I do think that the use of the power is guaranteed both by the form and by the appeal to Parliament itself.'[4] The evidence will, however, show that the guarantees relied on by the late Secretary of State have proved illusory in practice.

The Use of Sec. 67B of the Government of India Act

1. The Indian States (Protection against Disaffection) Act, 1922

The first use of the power of legislation by certification was made in 1922 in connexion with the Indian States (Protection against Disaffection) Bill, popularly known as the Princes'

[1] Vide p. 43 ante.
[2] *House of Commons Debates*, 4 December 1919.
[3] Was he speaking ironically ?
[4] *H.C.D.*, 4 December 1919.

Protection Bill. The Legislative Assembly sought to express its very strong repugnance to the measure by refusing leave for its introduction. Thereupon the Governor-General certified that the passage of the Bill was 'essential for the interests of British India' and recommended the Council of State to pass it in the form in which it was introduced in the Assembly. The Bill was passed by the Council of State without any amendment and became an Act of the Indian Legislature made by the Governor-General under Sec. 67B. As there was obviously no emergency to justify such action, the Governor-General did not exercise the power conferred by the proviso to Sub-Sec. (2) of Sec. 67B to enforce the Act forthwith. An authentic copy of the Act was accordingly sent to the Secretary of State who duly laid it before both Houses of Parliament. The Act then received the assent of the King in Council and came into force immediately after the fact of assent was notified by the Governor-General in the *Gazette of India*.

The manner in which the Bill was rejected by the Assembly annoyed Lord Reading, who apparently thought it was discourteous to him.[1] In fact, however, that was not in the minds of the Members of the Assembly, as was explained in the House later. On the merits of the legislation, opinion in India was divided. The Princes naturally wanted it and three of the Provincial Governments approved of it. On the other hand, the majority of the Members of the Assembly were strongly against it, as also three of the Provincial Governments. It must be remembered that there was no special protection against newspaper-attacks before 1910. In that year the Press Act imposed restriction on Indian newspapers in respect of criticisms of the Indian States. The Press Act Committee of 1921, of which the Law Member was Chairman and the Home Member an important member, found no evidence in justification of retention of the disability on newspapers, and it was accordingly removed.

In the House of Commons Mr Simpson, who supported the measure on its merits, doubted if it was essential for the

[1] Vide his Dispatch to the Secretary of State, dated 12 October 1922, forwarding an authentic copy of the Act.

safety, tranquillity or interests of British India.[1] Earl Winterton, Under-Secretary of State, maintained that it was. 'It is quite obvious', said he, 'that if in British India you allow every newspaper man of straw to make scurrilous attacks upon the rulers of Indian States, you will certainly be affecting the tranquillity of those States and also of British India.'[2] This inference does not, however, appear to be obvious. Yet the words used are so general that 'safety, tranquillity or interests' may be made to cover most measures. Granting that the enactment of this Bill was necessary for the interests of British India, it is doubtful if it could be held 'essential'. 'It is not any measure which affects the interests; it is a measure which the Viceroy can say is essential.'[3] This Act was dictated primarily in Imperial interests. It was passed in order to placate the Princes, the majority of whom 'have been our firm friends in dark times and in good times'.[4] It seems a little difficult to understand how a measure which was dictated by Imperial interests became necessarily essential in the interests of British India. Besides, it is pertinent to ask whether this means of discharging the debt to the Princes did not entirely overlook the debt that was owing to the Moderate Members of the Assembly. These were men who entered the Legislature in the face of hostility and ridicule from their countrymen, and courted unpopularity by their actions in the Legislature. In the first session of the Assembly fresh taxation to the tune of £18½ millions was passed. 'In 1921, the Assembly and the Council of State steadily supported Government in dealing with the Moplah outbreak, and, in the critical days of 1922, again backed Government in its measures against the non-co-operation movement.'[5] The reward for this steadfast support was the certification over their heads of the Princes' Protection Bill, followed soon after by the

[1] *H.C.D.*, 27 February 1923.
[2] ibid.
[3] As Mr Montagu emphasized. See above, p. 199 ante.
[4] Lord Winterton in the Commons. Vide *H.C.D.*, 27 February 1923. 'It seemed to me that . . . it was a debt which we owed to the States both under our engagements and in honour, and if either House of the Legislature refused to acknowledge it as such, it was my duty as Governor-General to see that it was paid.' Lord Reading, in his Dispatch of 12 October 1922, to the Secretary of State.
[5] *Simon Report*, vol. I, par. 275.

certification of the Finance Bill of 1923. But it must be remembered that the non-co-operation cloud had then lifted, for the arrest of Mr Gandhi in March 1922 ' marked the end of the movement as a serious threat to the Administration '.[1]

Politically, the certification of this Act was highly inexpedient. It disillusioned the Moderates and discredited them in the country and gave a rude shock to public confidence in the bona fides of the Reforms at a moment when it was none too high. Later events showed that there was hardly any adequate justification for the exercise of this undoubtedly autocratic power in the given case and at the given moment. The Act came into force on 28 April 1923, but the first prosecution was instituted in 1927. Up to 1930 there were only four prosecutions. If these figures indicate caution and restraint on the part of the Government in sanctioning prosecutions, they do no less indicate the absence of widespread abuse of the newspapers' right of criticism. For, surely, the fear of prosecution could not operate as a very strong deterrent in the case of ' newspaper men of straw ' who were supposed to be out for blackmail and adventure. It is also remarkable that there has been no prosecution in respect of attacks on any of the well-administered States. It is, therefore, reasonable to conclude that the occasion was not such as to justify the certification. At any rate, it would have been better statesmanship if, instead of the immediate application of the overriding power, the Government had accepted the verdict of the Assembly, and waited some time to see whether the abuse complained of increased or abated. If the case for legislation were still as strong as or stronger than before, a fresh Bill could have been easily introduced in the Assembly. If the Assembly were still unreasonably adamant, and this was not likely, the Governor-General's certification could be properly justified. And in the circumstances of the case very little would have been lost by the delay.

2. The Indian Finance Act, 1923

The Legislative Assembly passed the Finance Bill of 1923 with one important amendment. It reduced the Salt tax

[1] *Simon Report*, vol. I, par. 273.

to Re. 1.4 from Rs. 2.8 per maund, the rate which was in force at the time of the introduction of the Bill. When this amended Bill was laid before the Council of State the Governor-General, Lord Reading, recommended the Council to restore the Salt tax to the figure of Rs. 2.8 per maund as originally proposed. Quite characteristically, the Council of State passed the Bill as recommended. The Governor-General then recommended to the Legislative Assembly that it should pass the Bill in the form in which it had been passed by the other Chamber. The Assembly, however, after a heated debate, re-affirmed its previous decision. Thereupon the Governor-General certified that the passage of the Bill was essential for the interests of British India, and placed his signature on the Bill, which thereby became an Act. As he was of opinion that a state of emergency existed which justified such action, the Governor-General brought the Act into immediate operation.

In his Dispatch to the Secretary of State of 4 April 1923, Lord Reading set out the reasons for his action. The balancing of the Budget was to him the prime consideration. He referred to the cumulative deficits of 90 crores of rupees in the last four years of his predecessor's régime, and the imposition by Lord Chelmsford's Government of increased taxation of more than 17 crores in order to balance the Budget for 1921-2. He referred to the proposal of his Government for additional taxation and increased railway and postal rates estimated to bring in $19\frac{1}{2}$ crores in the Budget for 1922-3. The Government's proposal for doubling the Salt tax in the Finance Bill of 1922 was rejected by the Assembly, but the Governor-General did not override this rejection. 'My Government', wrote Lord Reading, 'were deeply impressed with the need urged by the Legislature for retrenchment as a necessary step precedent to any taxation of this nature', and this was the main reason why he refrained from exercising his power. He then referred to the appointment of the Inchcape Committee on Retrenchment and the economies effected in the Budget for 1923-4. The Government were emphatic that further retrenchment was impossible in the ensuing year. There was a deficit of $3\frac{3}{4}$ crores ($4\frac{1}{2}$ crores at the time of the presentation of the Budget), and the Governor-General

was convinced that the position could not be ameliorated by any revision of the estimates of revenue or by further reductions in expenditure. The rehabilitation of India's credit by balancing the Budget could not, in his opinion, be delayed. Borrowing on favourable terms was dependent upon it, as also the remission of provincial contribution to the Central Exchequer. No alternative to the Salt tax presented itself to the Government. He himself gave careful consideration to the objections against the Salt tax. The economic arguments seemed to him 'to stand on shadowy foundations'. The fall in the prices of food grains would make the burden infinitesimally small. 'The Assembly', concluded Lord Reading, 'was unable to agree on the adoption of any alternative form of taxation which would secure the amount required. Nevertheless, it rejected the proposal for the enhancement of the Salt tax. It was in these circumstances that it became my duty to certify the measure."[1]

The case of the Government was certainly strong. But the arguments on the other side were no less cogent. On the question of India's credit, Mr (later Sir) Montagu de Pomeroy Webb, a prominent business man, emphatically maintained 'that India's credit at the present day is first class'.[2] The improvement in credit resulting from certification must have been minimal. So the certification may be held to have been desirable, but it was surely not essential. Besides, if the balancing of the Budget was so essential as to justify resort to an extraordinary power for increasing the poor man's burden, howsoever light its weight, how could that be consistent with the appointment of the Lee Commission with the avowed object of immediate increment in the emoluments of the Superior Services in India in spite of bitter public opposition? On the question of alternative taxation Sir Henry Stanyon, a non-official European Member, remarked, 'I say without hesitation . . . that I regard the action of Government in insisting on that [that is, Salt] tax, after brushing aside on purely theoretical and speculative, and to my mind, in many cases, most unconvincing grounds, every alternative project advanced by the

[1] Vide *House of Commons Paper*, No. 74 of 1923.
[2] *L.A.D.*, vol. III, pt. V, p. 3984.

House, by Members who were as anxious to balance the budget as the Honourable the Finance Member himself—I say that in taking that course the Government fell into a political error of the first magnitude.'[1] Further, it was found next year that the receipts from the tax were much less than was anticipated and did not cover the deficit as the Finance Member had so strongly argued it would. Moreover, at the end of the year it was found that the total revenue was more than the estimated revenue and the total expenditure was less than the estimated expenditure, making the gulf between the two quite narrow. As a matter of fact, it is believed that Lord Reading was annoyed with the Finance Department when he saw the figures of receipts and expenditure at the close of the year, and it seems almost certain that he would not have certified the Salt tax if he could have anticipated this state of things. As to the economic effect of the Salt tax on the poor, opinions have been divided. The shrinkage of consumption after the doubling of the tax gave plausibility to the argument that it hit the poor. At any rate, the Salt tax has always been an unpopular tax, and an unpopular tax is a bad tax. 'The whole question is . . .', said Sir Malcolm (now Lord) Hailey, 'whether the occasion justifies it. The true test is whether a Government with a majority would not, in spite of a certain unpopularity likely to result from its vote, feel that the occasion justified its use.'[2] Applying this test one can say with some confidence that the answer is, no. For in this case there was the patent risk of grave unpopularity if the proposed course was pursued. And a Government with a majority would hardly have done it. The withdrawal by Mr Neville Chamberlain, Chancellor of the Exchequer and afterwards Prime Minister, of his proposal for a National Defence Contribution in order to placate his critics in the Party,[3] is a complete answer to Sir M. Hailey. In this context it is surprising to find that the deficit in the Budget of 1923-4 was not covered by the utilization of the five or six crores of rupees which had accumulated in the hands of the Secretary of State since 1915 as a result of the operation of

[1] *L.A.D.*, vol. III, pt. VI, p. 4318.
[2] *L.A.D.*, 1923, vol. III, p. 3994.
[3] See the *Annual Register*, 1937, pp. 37-8, 49-51.

captured enemy ships—a windfall which was utilized in the following year's Budget. For in that case certification and all that it means would have been avoided.

It must be held that the certification of the Finance Act of 1923, was, politically, wholly unwise and inexpedient. Economically, the arguments were more or less balanced. All things considered, the certification, even though desirable, could not be said to be essential in the interests of British India. It was ' a strained use of a legal authority '.[1]

3. The Finance Act of 1924

The consideration of the Finance Bill of 1924 was opposed by Pandit M. M. Malaviya. He criticized the Government of India for its failure to meet the wishes of the Assembly in respect of its demand for a Round Table Conference, and in respect of other questions like the Salt tax, Indianization of the Army, etc. He opposed the Bill because of want of confidence in the Government of India as then constituted, which was unable to protect India's interests, for example, in respect of the reduction of military expenditure and the appointment of the Lee Commission. ' Take away the Government of India Act if you please . . . but if you must govern India in the forms of civilized government, let reality be introduced in place of the sham that you have established here,' said Pandit Malaviya.[2] In concluding his long indictment, the Pandit observed : ' We cannot lend our moral support and vote to the maintenance of this taxation unless the representatives of the people of this country have a voice in the expenditure of the money raised by taxation, unless we are put in a position to exercise the same rights and privileges which the members of every Legislature in the world exercise.'[3] On 17 March 1924, the motion for consideration of the Finance Bill was lost by 60 votes against 57. The next day the Governor-General sent a recommendation asking the Assembly to pass the Finance Bill in a slightly modified form. The most important change was the fixing of the Salt tax at Re. 1.4 instead of Rs. 2 as in the

[1] See *H.C.D.*, 5 July 1923, speech of Mr Charles Roberts.
[2] *L.A.D.*, vol. IV, pt. III, p. 1924.
[3] ibid., p. 1944.

original Bill. Leave to introduce the recommended Bill was refused. Thereafter the Bill was taken to the Council of State with a recommendation from the Governor-General to pass it in that form. The Bill was, as usual, passed without any amendment by this House, and became an Act after being signed by the Governor-General, who brought it into force immediately.

The certification of the Finance Bill of 1924 differs fundamentally from that of the Princes' Protection Bill of 1922 and of the Finance Bill of 1923. In these two cases the opposition offered by the Legislative Assembly was on the merits of the proposals. In the present case, however, the opposition was almost wholly political. The Assembly wanted to expose the hollowness of the Reforms and to lay bare the autocratic powers of the Executive. It must, however, be noted that the actions of the Government in the past and the impolitic use of the Governor-General's power of certification in 1922 and 1923 contributed a great deal to the exacerbation of political feelings. The wholesale rejection of the Bill, both in its original and modified forms, made it absolutely necessary for the Governor-General to use his power of certification. This contingency was, of course, clearly foreseen and practically provoked by the Opposition.

4. The Bengal Criminal Law Amendment (Supplementary) Act, 1925

On 25 October 1924, Lord Reading promulgated an ordinance[1] giving drastic powers to the Executive in Bengal. Before the expiry of this ordinance a Bill was sought to be introduced in the Bengal Legislative Council incorporating the provisions of the ordinance in so far as they were within the competence of the Local Legislature. Leave for its introduction being refused by the Council, it was certified by Lord Lytton, Governor of Bengal, and after being duly laid before Parliament, it came into force. Those provisions of the ordinance which were beyond the competence of the Provincial Legislature were embodied in the Bengal Criminal Law Amendment (Supplementary) Bill, 1925. Clause 3 of the Bill

[1] The Bengal Criminal Law Amendment Ordinance (I of 1924).

enabled persons convicted on trial by special Commissioners under the Bengal Act to appeal to the High Court. It also required confirmation of death sentences by the High Court. Clause 4 enabled the Bengal Government, with the sanction of the Governor-General in Council, to detain arrested persons outside the Province. Clause 6 took away the right of habeas corpus under Sec. 491 of the Criminal Procedure Code.

The Bill was strongly opposed by Pandit Motilal Nehru, leader of the Swarajist Party. Mr M. A. Jinnah condemned it as 'an engine of oppression and of repression of legitimate movements' and argued that such powers would be abused as had been done in the past.[1] The Bill, like the Bengal Act which it sought to supplement, evoked universal condemnation within and outside the Assembly. Clauses 4, 5 and 6 were rejected by the Assembly. The Home Member declined to move the final passage of the Bill, as thus amended. On the following day, that is, on 24 March, the Governor-General sent a message to the Assembly with a recommendation to pass the Bill in its original form. After a heated debate the recommended Bill was also thrown out. The Governor-General then recommended it to the Council of State. That Chamber, to the surprise of none, passed the Bill as recommended. Thereupon the Governor-General, Lord Reading, certified that the passage of the Bill was essential and gave his assent to it. The Act thus made was immediately brought into operation by the Governor-General who was of opinion that there was a state of emergency justifying such action. As the Bengal Ordinance was to expire on 25 April 1925, there was not sufficient time for the normal procedure to be gone through.

On the merits of the legislation, opinions were sharply and irreconcilably divided. It was common ground that terrorism was wholly undesirable and the Nationalists further believed that it hampered political progress. The two main arguments of the opponents of such laws were, first, that they defeated their own purpose—that repression increased discontent and engendered a state of mind favourable to subversive movements ; and, secondly, that such laws were always liable

[1] *L.A.D.*, 1925, vol. III, p. 2809.

to abuse. The Indian bureaucracy, and the Governor-General is merely their mouthpiece in a matter like this, have unbounded and unshakable faith in repression as the cure for such a disease. Leaving aside, for the present, the merits of the two views, it may be safely asserted that the enactment of these repressive laws by means of such a procedure created a considerable volume of opinion against the Government and largely brought about conditions favourable to organized or unorganized resistance to it.

5. The Indian Finance Act, 1931

The Finance Bill of 1931 which imposed heavy taxation was, during its consideration stage, amended by the Assembly in respect of the proposal for income tax.[1] In order to ease the deadlock between the Assembly and the Government, Lord Irwin held an informal conference at the Viceregal Lodge. This meeting was attended by the leaders of the Parties in the Assembly and by Members of the Government. No compromise was, however, found acceptable. The day after, that is, on 26 March 1931, Lord Irwin made a recommendation under Sec. 67B, along with a lengthy and conciliatory note, explaining the reasons for his action. The recommendation was in the nature of a compromise. The amendment, stated Lord Irwin, was estimated to reduce the yield from income tax by about 240 lakhs of rupees. He admitted that the burden of additional taxation which was proposed could be justified ' only by most exceptional circumstances '. He appreciated the co-operation of the Members in having already accepted clauses of the Bill imposing new and onerous taxation, and fully recognized their desire to ensure utmost economy in the field of administration. He regarded it as essential that the Budget should ' be truly and securely balanced '. After careful re-examination, Lord Irwin thought that the maximum reduction of expenditure immediately feasible was one crore of rupees, to be effected mainly by postponement for a year of certain schemes for military re-equipment. He, therefore, recommended to the Assembly the acceptance of an amendment in the income tax schedule

[1] The amendment, which was moved by Sir C. Jehangir, was carried by 62 against 48 votes.

which would reduce the yield therefrom by one crore, 'while leaving a securely-balanced Budget'.[1]

In pursuance of the Governor-General's recommendation an amendment was moved on behalf of Government in the amended income tax schedule. This amendment was eventually defeated by 60 votes to 56. 'The only courses open to me', wrote Lord Irwin, 'were to submit to the rejection of my recommendation, which meant accepting an unbalanced Budget, or to use my powers of certification.'[2] He preferred the latter course and certified that the passage of the Bill was essential for the interests of British India. The Governor-General then recommended the Council of State to pass the Bill in that form. This the Council did on 30 March. On the same day the Governor-General gave his assent to the Bill and directed it to be brought into force immediately.

The world economic depression, reinforced by the Civil Disobedience Movement, resulted in considerable shrinkage in revenue. The Finance Member was faced with a deficit of about 17 crores. He claimed that a substantial reduction of 1,70 lakhs would be effected in the military budget. This was proposed to be done by extending the re-equipment programme over another year. A further cut of 1,13 lakhs was due to 'reduced costs of various articles and savings effected by the military authorities by their economy campaign, and also by postponing part of the ordinary military engineering services'. This was regarded by Sir George Schuster as 'an exceptional cut made in exceptional circumstances to meet the present emergency'. In a military budget of over 55 crores the reduction was, in fact, no real reduction at all. For it was partly due to postponement for about a year or so of some expenditure and partly due to the abnormal fall of prices of food grains and other stores.[3]

The Finance Member rejected the idea of making a cut in salaries, firstly because the saving effected would not be

[1] *L.A.D.*, 1931, vol. IV, pp. 2707-8.

[2] Vide Governor-General's Dispatch to the Secretary of the State, No. 22, dated 2 April 1931. *H.C. Paper*, No. 109 of 1931.

[3] Diwan Bahadur (now Sir) Ramaswamy Mudaliar justifiably complained 'that on the military side there has been no retrenchment whatever'. *L.A.D.*, 1931, vol. III, p. 2656.

appreciable (about 38 lakhs to the Government of India by a 10 per cent cut) ; and secondly because any alteration 'in the basic and fixed rights of serving officials . . . would be a breach of contract, cutting at the roots of confidence in the good faith of Government, and likely to create a feeling of uncertainty in the public service which would be particularly detrimental at the present period of constitutional transition'. He, however, recognized that a national emergency might demand some sacrifice. The action proposed was twofold : first, sacrifice to meet the emergency by increase in the rate of income tax ; this, he claimed, would entail fair sacrifice on the part of all classes, rather than a particular class, namely, the Government servants. Secondly, he proposed to hold in the near future a conference with representatives of Provincial Governments to discuss the conditions of pay, etc., of future entrants. As to the first proposal, it is relevant to remember that the considerable increase in emoluments of certain classes of Government servants, which was effected in pursuance of the Lee Report, was mainly justified on the plea of rise of prices in the post-war period. It was only fair that now that there was a heavy all-round fall of prices there should be reduction in those emoluments, particularly when so many taxes were to be borne by the other classes in the country who were already hard hit by the depression. Besides, such action would have produced very valuable moral effect on the Assembly as well as on the country.

While the Government was emphatic that the Budget must be balanced and consequently the proposed increased taxation was necessary, the members of the Opposition maintained that the balancing ought to be done not only by increased taxation but also by adequate retrenchment.

At the time of the discussion of the recommended Bill,[1] Dewan Bahadur Rangachariar, Sir A. Rahim and others who opposed the particular amendment paid the highest compliments to Lord Irwin who had just earned deep public esteem by making the famous Gandhi-Irwin pact of 1931. They contended that twenty-four hours were not enough time for the Governor-General to weigh carefully all the reasons that

[1] See *L.A.D.*, 1931, vol. IV, pp. 2745 ff.

were advanced against the proposal and that his colleagues were ill-advised in offering such counsel. Mr Rangachariar argued that after the Government had agreed to effect a reduction of one crore, the difference was only a crore and 34 lakhs. 'Was it necessary', he asked, 'in this huge Budget to resort to this most extraordinary procedure?'[1]

The Governor-General no doubt showed a commendable spirit of appreciation of, and accommodation to, the non-official point of view. In view, however, of the political consequences of the exercise of such an autocratic power as certification, this was not a fit occasion for its use. Balancing of the Budget is surely desirable in the interests of credit. But the adverse effect of a slightly unbalanced Budget would most probably have been counterbalanced by the gains arising out of deference to public opinion. Without entering into the merits or otherwise of an unbalanced Budget, and there are weighty opinions on either side, it may be pointed out that it tells heavily on a country's credit not because of the gap between expenditure and revenue as such, but because of a fear of the worsening of the financial position and consequent inflation. In the present case, however, the deficit was small and the Government of India had shown sufficient regard for financial orthodoxy by promptly levying heavy taxation. It is doubtful if any appreciable fall in India's credit would have resulted if the deficit were left uncovered.[2]

6. The Indian Finance (Supplementary and Extending) Act, 1931

The Finance Act of 1931 was certified by Lord Irwin on 30 March 1931. On 29 September a Bill to supplement and extend that Act was introduced in a special session of the Assembly. This Bill proposed further taxation and provided for the operation of the Finance Act, 1931, till 31 March 1933. The Bill was thus a departure from the established convention, in that it fixed the rates of taxation for eighteen

[1] See *L.A.D.*, 1931, vol. IV, pp. 2745.

[2] Lord Irwin was extremely reluctant to certify this Bill. His decision to use his extraordinary power might have been due to (*a*) the supposed threat of resignation held out by Sir George Schuster, and (*b*) his desire to ease matters for Lord Willingdon who was to succeed him within a few days.

months ahead instead of a year. The Assembly was annoyed that a second taxation Bill was introduced in the same session, when it had only recently passed a resolution requesting the Government not to bring forward such legislation during that session. The two Opposition groups (the Congress Party was not there) combined in an attempt to refuse leave for introduction, but were unsuccessful. The Bill was taken into consideration at the Delhi session. Certain amendments were carried against Government, which reduced the estimated yield by about 4 crores. Lord Willingdon, the Viceroy, following Lord Irwin's example, had an informal discussion with representatives of all the parties and groups in the Assembly on 20 November, but no compromise was arrived at. Thereupon he recommended the Assembly to pass the Bill in a slightly modified form. The motion for the passing of the Bill as recommended was defeated by 63 votes to 48. The Governor-General certified that the Bill was essential for the interests of British India. On 23 November the certified Bill, with the usual recommendation, was laid before the Council of State. It was passed without any amendment by that Chamber on 27 November. The Governor-General assented to the Bill on the 28th and directed that it should come into force forthwith.

There is no doubt that the Government of India, like other Governments, was faced with a serious financial crisis. That the Government was now alive to the gravity of the situation was evident from the imposition of a voluntary reduction in the salary of the Governor-General and the Members of the Executive Council by 20 and 15 per cent respectively, and the proposal to effect a temporary cut in the salaries of Government servants, except those in receipt of a certain minimum salary, by 10 per cent inclusive of any surcharge on income tax. But the imposition of new taxes and the increase of old taxes within a few months of the enactment of the normal Finance Act were naturally resented by the elected Members. The non-official Members, including even the European group, felt that there was further scope for retrenchment, while the Government felt convinced that there was little prospect in that direction.

Apart from the merits of the certification of a Bill, the procedure is inherently unsound, even where necessary. This becomes clear from the following remarks made in the Assembly after the introduction of the recommended Finance Bill. Sir H. S. Gour referred to the inaugural speech of the Duke of Connaught who, in the name of the King, had declared that the principle of autocracy was dead. 'Those of us who believed that the principle of autocracy was really dead countered the opposition we received in the country and came to this House to co-operate with the Government. . . . I had hoped that with the growth of time the conventions which were recommended by the Joint Parliamentary Committee would be given effect to and that the Government of India, if not responsible, would be responsive to the popular section of the House. . . . It [the Bill] is the best refutation of the hopes and aspirations of those who came to this House to inaugurate the Reforms and to see that a new order would take the place of the old. . . . Our verdict is a considered verdict, and we should be stultifying ourselves if we once more acceded to the request [to pass it]. The responsibility is a responsibility of the executive Government. We the representatives of the people are unable to lend our assistance to place upon the Statute Book the Bill . . .'[1]

Mr (now Sir) Md Yamin Khan, a habitual supporter of Government, complained of the pre-determination that the Bill should be passed in that form. He expected Government to think twice 'before overriding those decisions which have been taken by even the most moderate' Members.[2] On the other hand, Sir G. Rainy, Leader of the House, said: 'In any action which the Members of the Government have had to take or to advise, they have been very deeply conscious of the responsibility that rests upon them. . . . They also fully appreciate the difficulties which [the non-official] Members have to face, and we respect the motive from which they act.'[3] 'I can assure Honourable Members opposite', said Sir George Schuster (Finance Member), 'that if they

[1] *L.A.D.*, 1931, vol. VII, p. 2198.
[2] ibid., pp. 2199-200.
[3] ibid., p. 2202.

object to this form of procedure, their objections are felt with equal, possibly with even greater strength, by us. . . . But we feel that we have been forced into this position by the nature of the present constitution. . . . No other course would be consistent with the responsibility which we at present hold.'[4]

7. The Indian Finance Act, 1935

The Finance Bill of 1935 was amended in certain respects by the Assembly. The amendments were :

(1) Reduction of the rate of Salt duty from Re. 1.4 per maund to 12 annas per maund, involving a loss of revenue of 325 lakhs.

(2) Retention of the export duty on skins, which was proposed to be repealed, resulting in a gain of 8 lakhs.

(3) Removal of the income tax on incomes between Rs. 1,000 and Rs. 2,000 per annum, involving a loss of 50 lakhs.

(4) Reduction of the price of postcards and two other amendments to the postage rates, involving $76\frac{1}{2}$ lakhs in all.

Acquiescence in the amendments as a whole, which would have involved a net loss of revenue of $443\frac{1}{2}$ lakhs, was, in the opinion of Lord Willingdon, clearly impracticable. As to whether he should meet the views of the Assembly in part 'by acquiescing in such of the amendments carried by the Assembly as might arguably have been accepted without unbalancing the Budget to an impossible extent' he felt that the only amendments which could be accepted 'consistently with the minimum requirements of the financial situation' were the amendment regarding export duty on skins and the two minor amendments to the postal rates. He rejected the first on the ground that the repeal of the duty would be definitely beneficial to the agricultural classes. He maintained that 'in carrying the amendment by a majority of one vote only the Assembly failed accurately to reflect the attitude of public opinion on this question'. The benefit to the tax-payer—in particular, to the poorer tax-payer—arising out of

[4] *L.A.D.*, 1931, vol. VII, pp. 2203-4.

the minor amendments of the postal rates would be minimal, but would retard the restoration of solvency in the Posts and Telegraphs Department. Thus a substantial reduction was unacceptable because it was substantial, and a slight reduction was not accepted because it was of little benefit to the tax-payer sought to be benefited. 'While in different circumstances', wrote Lord Willingdon, 'I would readily have recognized the possibility that the political advantages of deferring in part to the Assembly's verdict might well outweigh the practical disadvantages involved in the acceptance of amendments which I believed to be on merits mistaken, I could not but feel that on the present occasion this consideration was deprived of most if not all of its normal weight by the indisputable fact that the Opposition in the Assembly had for the most part been concerned merely to defeat and embarrass Government and had accorded little or no impartial consideration to the merits either of the proposals originally embodied in the Bill or of their own amendments to these proposals.'[1]

Sir James Grigg, Finance Member, justifying certification said, 'When there is a clear evidence of a change of heart, when we are satisfied that they [the Opposition] are prepared to co-operate with us in promoting the true interests of the people, then, Sir, but only then, are we prepared to consider and meet their views to the maximum extent that is consistent with the faithful discharge of our own responsibilities.'[2]

The mentality disclosed by Lord Willingdon and the Finance Member is worth noticing. They were not prepared to give any real weight to the views of the Opposition because they felt that the latter were primarily actuated by political motives of embarrassing the Government. This being their reaction to the criticisms of the Opposition, they could not naturally consider those criticisms properly on their merits. That the Governor-General and the Finance Member were wrong in their conclusion is evident from the fact that some of the amendments received the blessings of the level-headed European group who were surely not irresponsible critics.

[1] Lord Willingdon's Dispatch to the Secretary of State, No. 58, dated 25 April 1935. *H.C. Paper*, No. 113 of 1935.

[2] *L.A.D.*, 1935, vol. IV, p. 3831.

On their merits, some of the amendments, at any rate, deserved better consideration. As Sir Leslie Hudson, Leader of the European group, observed in the course of his speech on the recommended Bill : ' We believe that some at least of these amendments might have been accepted without detriment to the budgetary position and that such action would have been in the interests of this country.'[1]

8. The Criminal Law Amendment Act, 1935

The Criminal Law Amendment Bill was introduced in the Legislative Assembly on 2 September 1935. After six days' discussion the House, by 71 votes to 61, refused to take the Bill into consideration. In an address to the Indian Legislature on 16 September, Lord Willingdon said : ' I had hoped that the Assembly would share with Government the responsibility for this measure. Their refusal to do so has transferred the responsibility to me and after taking time to consider all the implications of action or inaction on my part I have decided, in discharge of my responsibility for the safety, tranquillity and interests of British India, to give the Assembly an opportunity to reconsider their decision.'[2]

The recommended Bill was, by 69 votes to 57, refused introduction. The Bill was then laid before the Council of State and that House passed it without a division. The Governor-General then assented to the Bill and sent a copy of the Act to the Secretary of State for the assent of His Majesty in Council.

The effect of this Act was to give permanency to the Indian Press (Emergency Powers) Act, 1931, and most of the provisions of the Criminal Law Amendment Act, 1932. These two Acts were in the ordinary course to expire on 18 December 1935. The first Act was passed for a year only, but was extended by the second Act. The Press Act established rigid censorship of the Press, not, of course, by the usual Continental method of prohibiting publication in the press except after approval by a censor, but by the no less effective British method of requiring heavy deposits from keepers of printing presses

[1] *L.A.D.*, 1935, vol. IV, p. 3819.
[2] *L.A.D.*, 1935, vol. V, p. 1024.

and publishers of newspapers and by the forfeiture of such deposits and such presses under executive order. The Criminal Law Amendment Act of 1932 sought to give effect to the Special Powers Ordinance, 1932. The important provisions of this Act were to penalize the dissemination of the contents of proscribed documents, to make picketing a penal offence, to sequester the buildings and funds of associations declared unlawful by executive order, and to control the Press.

The Criminal Law Amendment Bill of 1935, incorporating as it did the above provisions, and that for an indefinite period, imposed severe limitations on the rights of the Press and of the subject. Here the question is not whether such severe limitations were necessary or justifiable in 1932. The question is whether there was sufficient justification for their retention by certification in 1935.

The Governor-General was of the opinion that the Act was essential because of the threat of civil disobedience, terrorism, communism and communal hatred. Although civil disobedience was then in abeyance, the principle of civil disobedience had not been abandoned, and in Lord Willingdon's opinion it was a sufficiently real danger to justify, among other reasons, the retention of the Act. As to terrorism, the situation had considerably improved, but it was apprehended that any relaxation of the provisions relating to the press would very quickly undo the improvement effected. The Governor-General was also satisfied that communism formed 'a very real, though possibly not an immediate, menace to the peace of the country'. Lastly, there was the danger of communal feeling. Lord Willingdon admitted that much of the opposition to the Act was due to the fact that no period had been set to its validity. The main reason for this was that he found it impossible to foresee any reasonable period of time within which terrorism and communal unrest, at any rate, would not constitute serious menace to the public peace.

As to civil disobedience, Lord Willingdon appears to have been too much unnerved by the declarations of Congress leaders, especially Mr Gandhi. The basis of authority, in the ultimate analysis, lies in the acquiescence of the governed.

Whenever and wherever the subjects of the law labour under any serious grievance and are prepared to face the consequences and the risks of their action, and are unable to find a remedy by legal and constitutional means, they are likely to challenge the Government by defiance of its authority, either by violence or by non-violent disobedience of its laws. In this sense, the reiteration by Congress leaders of their faith in civil disobedience was, in effect, the statement of a truism. Real statesmanship lies, not in being swept off one's feet by such declarations, but in eradicating the causes that induce resort to such extreme paths of suffering. Apart from this consideration, acquaintance with the prevalent political situation would have satisfied any person with strong nerves that civil disobedience was not for the time being a real danger. As to communal feelings, it seems reasonable to hold that what was wanted was the timely enforcement of the ordinary law of the land rather than additional powers. Communism was admittedly a contingent danger.

It seems, therefore, that, on the whole, the stringent provisions of the Act were meant more to guard against future troubles than to cope with an existing situation. The use of the extraordinary power of legislation was, in this view, not warranted by the circumstances. The Legislature was not wrong in taking up the attitude it did towards this Criminal Law Amendment Bill. It is interesting to note in this context Sir George Rainy's speech in the Assembly in February 1932, on Sir H. S. Gour's resolution on the 'recent ordinances'. Justifying the promulgation of the numerous ordinances to deal with the second Civil Disobedience Movement, instead of coming to the Legislature for the necessary powers, Sir George said, *inter alia*,

'Had we come forward with emergency proposals of that kind not to meet an actual emergency but a possible one, the House would have refused, and I think rightly refused, to arm us with powers to meet a contingency which has not yet arisen.'[1] Surely this argument of Sir George Rainy is practically a complete answer to the case for the Act. Moreover, the procedure of certification should not have been resorted to,

[1] *L.A.D.*, 1932, vol. I, pp. 282-3.

in view of the fact that any contingency could have been met by the issue of an ordinance.

The psychology behind the demand for repressive laws in India is quite interesting. In effect it is this. When there is a political trouble which is possibly largely due to some act or omission of the Government themselves, they want powers to deal with it. If the powers taken are found inadequate, they ask for further powers to maintain peace and order. When the powers are found sufficient or more than sufficient and the situation is under control, they want to retain those powers, lest there should be a recrudescence of the trouble. In this way, emergency powers tend to become permanent.

9, 10 and 11. The Finance Acts of 1936, 1937 and 1938

The Finance Bill of 1936 was amended by the Assembly as follows :

(1) The Salt duty was abolished, involving a revenue of 8 crores of rupees ; (2) the rates for single and reply postcards were reduced from 9 pies and $1\frac{1}{2}$ annas to 6 pies and 1 anna respectively, involving a loss of revenue of about 50 lakhs ; and (3) the weight of registered newspapers to be carried for a quarter of an anna was raised from 8 to 10 tolas, involving a loss of revenue of about Rs. 74,000.

Lord Willingdon found it impossible to accept the amendment regarding the Salt duty. 'Indeed it is safe to say', observed the Governor-General, 'that all the Members who voted for the amendment must have realized that its adoption would involve resort to my special powers.'[1] As to the rates for postcards, he concluded that, apart from the 'extreme importance of maintaining the financial solvency of the Posts and Telegraphs Department, acquiescence in the amendment would have unbalanced the Budget as a whole to an extent incompatible with' his responsibility for the financial welfare of India. The financial effect of the third amendment being insignificant, he decided to accept it. He accordingly made a recommendation to the Legislative Assembly to pass the original Bill with this one change.

[1] Dispatch to the Secretary of State, No. 65, dated 14 April 1936. *H.C. Paper*, No. 129 of 1936.

The Finance Member's amendment to restore the Salt duty to Re. 1.4 per maund was defeated by 68 votes to 51. The Governor-General then certified the Bill, which was passed by the other Chamber. The Governor-General assented to it and brought it into force immediately.

The Finance Bill of 1937 which was amended by the Assembly, and the Finance Bill of 1938 which was thrown out at the consideration stage by the Assembly as a political gesture, were both certified by the Governor-General.

Parliament and Legislation by the Governor-General under Sec. 67B

Mr Montagu claimed that the provision regarding Parliament's supervision was an effective safeguard against the misuse of the extraordinary power of legislation.[1] In fact, however, this has proved illusory. Of the eleven Acts which were enacted by the Governor-General's certification, only two were at all debated in the House of Commons and naturally none in the House of Lords. The procedure of laying the Acts on the table does not mean anything more than making them available in the library of the House, and, as Colonel Yate put it, 'A Paper may lie for nine days or for twenty-nine days, and who knows anything about it?'[2] It is significant that, unlike the Rules that might be made by the Secretary of State under Sec. 19A for instance, these Acts do not require the affirmative approval of Parliament. Its active intervention is required for expressing disapproval of such Acts. Either because of lack of knowledge, or of the lack of suitable opportunities, or of a sense of futility, or of approval of the step taken, the Members of Parliament have palpably failed to perform their self-imposed task of 'trustees' for the interests of India.

The two instances referred to were the Princes' Protection Act of 1922 and the Finance Act of 1923. The first was discussed on Colonel Wedgwood's motion, 'That an humble Address be presented to His Majesty praying that he withhold his assent' to the Act. The motion was, of course, defeated by 279 votes against 120, the members of the Labour Party

[1] Vide p. 199, ante.
[2] *H.C.D.*, 3 December 1919.

and some Liberals voting in its favour. There was a fairly long discussion, but Members of the Front Bench on either side did not participate.[1]

The Finance Act of 1923 was debated on the India Office vote when there was a thorough discussion.[2]

The ineffectiveness and unreality of these discussions are quite clear. In the first place, Parliamentary criticism in these matters is in most cases bound to be *ex post facto*. Of the eleven certified Acts, nine were brought into force forthwith by the Governor-General in exercise of the discretion vested in him, and only two, namely the Princes' Protection Act, 1922, and the Criminal Law Amendment Act, 1935, were allowed to follow the normal course. So far as Finance Acts are concerned it is inevitable that they should be enforced without delay, because they do not pass through the Legislature till about the last day or so of the expiring financial year.[3] And eight out of the eleven certified Acts were Finance Acts. When an Act is thus put into operation immediately the only action that Parliament may take is to pray His Majesty in Council to disallow it. But, as the Prime Minister stated, 'it would be unusual to allow time for discussion of such a motion'.[4] The Finance Act of 1923 came into force on 29 March of that year. The discussion in the House of Commons did not take place until 14 June when it was adjourned and was not resumed till 5 July. Now, even assuming for the sake of argument that the majority of the Members of the House of Commons very strongly felt the inequity and inexpediency of the certification of that Act, they could hardly go to the length of voting against it, for, apart from other reasons, such action would at that stage have serious repercussions on the Government of India and the public. Thus so far as the Act in question was concerned, Parliament's hands were tied.

In the second place, it is well known that in having recourse to certification the Governor-General does act in consultation with, and with the approval of, if not sometimes

[1] *H.C.D.*, 27 February 1923.

[2] *H.C.D.*, 14 June and 5 July 1923.

[3] Besides, in the case of financial legislation a period of suspense is undesirable from the point of view of the Government as well as of the public.

[4] *H.C.D.*, 30 May 1923.

under pressure from, the Secretary of State. Any criticism of the Viceroy's action means in effect criticism of the Secretary of State. The latter will invariably support the Viceroy and defend his action even where in private he disapproves it, for otherwise the Governor-General is likely to threaten resignation, an eventuality which British Cabinets would hardly face. The result, therefore, is that the motion practically becomes a vote of censure on the Government, and by the use of its automatic majority the Cabinet will secure its rejection. Besides, the majority of the Members will shrink from carrying the motion, for that is sure to result in the resignation of the Governor-General. This becomes perfectly clear from the observations made by several Members of the House of Commons in the course of the debate on the Princes' Protection Act. 'If the House accepts the Motion,' remarked Sir P. Newson, 'it would necessarily mean the resignation of the Viceroy, and, I imagine, also of the Secretary of State. . . . His [Lord Reading's] view is that this Bill is needed. . . . Are we going to tell him that it is not? If so, what sort of administrators are we going to get?'[1]

Mr Gwynne, another Member, said, 'This is really a matter in which the Viceroy and the Secretary of State are entirely and directly responsible, and if this Motion be pressed to a Division and carried, it will be a vote of censure on the Government.'[2] The attitude of Government towards such motions was explained by Lord Winterton, Under-Secretary of State for India: 'This motion is, in effect, a vote of censure on him [the Governor-General] for abusing his powers, and also on the Secretary of State for approving of his action.'[3]

Discussing the responsibility of the House of Commons in this matter, Mr Charles Roberts observed: 'The same Statute which gives the Viceroy this emergency power makes the House of Commons the ultimate authority to review its use.'[4] But he himself also held that when the Governor-General certified that a measure was essential for the interests

[1] *H.C.D.*, 27 February 1923.
[2] ibid.
[3] ibid.
[4] *H.C.D.*, 5 July 1923: debate on the certified Finance Act, 1923.

of India, it should be a very strong case indeed for the House of Commons to use its ultimate power of overriding such action.[1] But in order to give reality to the Reform of 1919 and to prove that it was an advance on the undiluted autocracy that preceded it, the proper attitude of the House of Commons should, it is submitted, be just the reverse. Is there, the House should ask itself, an overwhelming case for the Governor-General to override the popular House? If not, he should be overridden.

In the circumstances, however, one is fully justified in holding that Parliament has been, except on paper, no guarantee against any misuse of the extraordinary power of legislation.

(C) *The Legislative Powers of the Governor-General: Ordinances under Sec. 72*

The ordinance-making power of the Governor-General dates from the Indian Councils Act of 1861. Opposing this provision of the Bill of 1861, Lord Ellenborough said that he was unwilling to trust, except in peculiar circumstances of emergency, to any individual whatsoever the absolute power of making a law to bind a great empire.[2] But he was not against the existence of this power in the hands of the Executive and proposed to give it to the Governor-General in Council, the Governor-General having the right of overruling his Council as in respect of executive action. Defending the clause as it stood, Earl de Grey and Ripon said 'that as this power was of such an extraordinary character, and would only be exercised in circumstances of peculiar emergency, the Government had thought it most desirable, on the whole, that it should be confided to the Governor-General alone, in order that he might be solely responsible for its exercise. It might happen, too, that at the time when it was necessary to exercise it the Governor-General might be absent from his Council'.[3] This extraordinary power of the Governor-General owed its origin to the experiences of the Mutiny of 1857 and it may be

[1] See *H.C.D.*, 27 February 1923.
[2] *Hansard*, Ser. 3, vol. CL., XIV, pp. 962-3.
[3] ibid., p. 963.

presumed that it was intended to be used in circumstances of peculiar emergency as those of the Mutiny.

The ordinance-making power practically remained unused until the Great War. Between 1861 and 1914 only seven ordinances were issued. The declaration of war was followed by the promulgation of a number of ordinances. Between 1914 and 1918 the ordinances issued numbered twenty-seven. In 1919 and 1920, eleven ordinances were issued. The ordinances issued until the War were not only wholly negligible in number, but their scope also was narrow and their subject-matters unimportant. Those promulgated during the period 1914-18 were purely war measures, and many of these dealt with currency and exchange. Of the ordinances issued in 1919 and 1920, six dealt with law and order, of which five were in connexion with the notorious Martial Law régime in the Punjab. In the post-Reform period, that is, after 1921, as many as fifty-two ordinances were brought into operation. In number, but more so in scope and severity, these ordinances were clearly unprecedented, and most of them were in the domain of so-called ' law and order '. And this very extensive use of a purely autocratic power was made after the inauguration of the Montagu-Chelmsford Reforms, when it was declared on high authority that ' the principle of autocracy ' was dead.

A few of these ordinances were of minor importance, but most of them were of enormous significance and vitally affected the life and property of the people. Almost all these ordinances gave rise to bitter controversies. Such executive orders were regarded by Government as absolutely essential for the proper discharge of its functions, while non-official opinion persistently questioned their necessity and real efficacy. There can hardly be any doubt that the provisions of almost all of these ordinances were of an extremely drastic and repressive character. This will become evident from a consideration of a few of them.

1. The Bengal Ordinance, 1924

To take, first of all, the Bengal Ordinance of 1924, the precursor of a long line of similar but more stringent ordinances.

This ordinance empowered the Local Government to direct the trial by special commissioners of persons alleged to be terrorists. The accused were given the right of appeal to the High Court against all convictions by these special courts, while sentence of death required confirmation by the High Court. The Local Government was authorized to control the movements of suspected persons by requiring them to notify their residence or any change of residence, or to report themselves to the police. Any such person could be detained in prison without trial and arrested without any warrant. Wide powers of search were given to the executive who could also arrest without warrant any person against whom any reasonable suspicion existed. Cases of persons detained in custody were to be submitted for scrutiny to two judges who had necessarily to go by *ex parte* evidence untested by cross-examination. Finally, no suits or prosecutions or other proceedings were to lie against any person for anything done or intended to be done in good faith under the provisions of this ordinance.

2. The Bengal Emergency Powers Ordinance, 1931

This authorized officers of Government to require any person suspected to be acting or about to act in a manner prejudicial to the public safety or peace to give an account of his identity and movements, and to arrest and detain him for twenty-four hours for the purpose of obtaining and verifying his statements.

Government, which meant local officials, were given power to take possession of any land or building to be utilized as quarters or offices for public servants, and for other purposes. Police officers were given wide powers of search. Provision was made for the imposition of collective fines on disturbed areas. For speedy and effective trials there were to be special judges, special magistrates and special tribunals. Special tribunals were empowered to award any sentence and no confirmation of death sentence by the High Court was required, although, it may be noted, a death sentence pronounced by a sessions judge sitting with a jury requires such confirmation. The special magistrates were to follow the summary procedure of trial and were given the power to

award sentences other than those of death or transportation or imprisonment for seven years.

Where a young person below 16 was convicted of an offence under this ordinance or of an offence which in the opinion of the court had been committed in furtherance of a movement prejudicial to the public safety or peace, and such young person was sentenced to fine, the court could order the parent or guardian to pay the fine, or in default suffer imprisonment. An attempt to murder was made a capital offence.

Wide rule-making powers were given to the Local Government and its agents. The jurisdiction of ordinary courts was barred.

3. The Emergency Powers Ordinance, 1932

This applied to the whole of British India. Under it, any authorized officer of Government could, if satisfied that there were reasonable grounds for believing that a person acted or was about to act in a manner prejudicial to the public safety or peace, arrest such person without warrant. The person in question could be detained in prison for fifteen days or, under the special orders of the Local Government, for a longer period, subject to a maximum of two months. Power was given to local officers to control the movements of suspected persons, to take possession of private buildings, to prohibit access to certain places, and to control the supply of commodities in general use. There was provision for the imposition of collective fines. And, as usual, the jurisdiction of courts was barred in respect of complaints against any officer acting or purporting to act in good faith.

The existence of laws[1] of this character left little scope for the operation of the rule of law, the establishment of which has been claimed as one of the most notable achievements of British rule in India.[2] Without entering into the question as to how far such drastic laws were necessary, two points may be noticed here. In the first place, it is almost a truism to say that where so large and arbitrary powers over life, liberty and

[1] ' Lawless laws ' as the Indian publicists called them.

[2] Vide *Joint Parliamentary Committee Report*, 1934, vol. I (pt. I), par. 6.

property were given to the executive, and an irresponsible executive at that, where there was no effective check on their exercise, either by public opinion or by superior official supervision, and where any fear of the consequences of wrongful action at the hands of the Courts of Law was absent *ab initio*, there were bound to be, human nature being what it is, innumerable occasions of flagrant misuse of power and many innocent persons must have suffered along with persons against whom the laws were intended to operate.[1]

In the second place, it does not seem unfair to say that where one single individual has the right, which is freely exercised as in the present case, of interfering with the life, liberty and property of the subjects by executive decrees, there does not exist, for the time being at any rate, a constitutional government.

Apart from the contents of these ordinances, the time and manner of the promulgation of many of them were surely not in conformity with constitutional propriety. Before discussing this question it is necessary to explain the constitutional implications of, and the difference between, the powers of the Governor-General to legislate by certification and by ordinance.

As already stated, the power of legislation by certification is exercisable where a Bill is turned down by one or both Houses of the Central Legislature and the Governor-General is of opinion that the passage of the Bill is essential for the safety, tranquillity or interests of British India or any part thereof. On the other hand, an ordinance is a law made and promulgated by the Governor-General in case of emergency for the peace and good government of British India or any part thereof. Both are in essence executive orders, though the former is camouflaged under the name of an Act. The

[1] cf. the following remarks of Lord Hewart, Lord Chief Justice, in the course of his summing up to the jury in a case in which two police constables were sued for damages for assault and false imprisonment by an actor wrongly suspected of having stolen a coat: 'It was a perilous thing when great powers, with the knowledge, it might be, of great force behind, were recklessly, foolishly, or over-zealously applied . . . If once signs were shown of giving way to the abominable doctrine that, because things were done by officials, therefore some immunity must be extended to them, what was to become of liberty?' See Ludlow *v.* Shelton and another, reported in *The Times* of 4 February 1938. With what greater force would these remarks apply to India during the period in question!

latter is, pure and simple, an executive order, with all the force of an Act of the Legislature.

One constitutional difference between the two methods of legislation is that, in the first case the Bill must be presented to both Chambers of the Legislature, and only after non-compliance by either of them can the Governor-General certify. A certified Act is, therefore, preceded by publicity and discussion. Legislation under this procedure naturally requires time. If the Legislature is in session the process may, by suspension of the standing orders, be completed in a day. If, however, it is not in session, some days must elapse before certification can be resorted to. An ordinance, on the other hand, need not be, and seldom is, preceded by discussion in the Legislature. It is legislation by mere executive order which has been prepared in secret. All that is necessary is enough time to get an ordinance drafted, signed and published. An ordinance is obviously meant to meet a situation where time is the overriding factor. Further, an Act certified by the Governor-General may be temporary or permanent, but an ordinance may not be in force for a day longer than six months.

As to whether conditions[1] exist which justify the promulgation of an ordinance, the Governor-General is the sole judge. This was clearly laid down by the Privy Council in the case of Bhagat Singh *v.* the King-Emperor. On 1 May 1930, the Governor-General, Lord Irwin, promulgated the Lahore Conspiracy Case Ordinance (No. III of 1930), which transferred the trial of the Lahore conspiracy case from a magistrate holding preliminary enquiry to a tribunal of three High Court judges to be appointed by the Chief Justice of Lahore. While the trial was pending before this tribunal an application was made on behalf of Des Raj, one of the accused, for a writ of habeas corpus under Secs. 491 and 561A of the Criminal Procedure Code. The application was heard by a Divisional Bench of the Lahore High Court, consisting of Broadway and Bhide, JJ. Broadway, J. held that the Court had no jurisdiction to consider whether there was a state of emergency.

[1] The conditions are (*a*) the existence of an emergency, and (*b*) the ordinance must be for the peace and good government of British India.

'It seems to me', observed his Lordship, 'that it was the intention of the framers of the Act to leave it to the Governor-General to decide, as a pure act of administration, whether a state of emergency existed which called for an ordinance and that his decision on that point is, and was intended to be, final and not liable to consideration by the Courts.'[1]

On the other hand, Bhide, J., held that the Court had jurisdiction. 'There is nothing in the language of Section 72', he observed, 'to indicate that the Governor-General's opinion . . . is to be taken as final.'[2]

'If, for instance,' he said, 'it is found that an ordinance was promulgated in the absence of any emergency whatever or for a purpose wholly unconnected with the peace or good government of the country . . . can it be maintained that a Court of law has no power to declare the ordinance to be invalid? I think the answer to this question must clearly be in the negative.'[3] He thought the position as regards ordinances was analogous to regulations under the Defence of the Realm Act in England during the War—where the Courts inquired whether any particular regulation was reasonably necessary for public safety.[4]

On the facts of the case, however, he held that the conditions necessary for issuing an ordinance were satisfied. In the result the petition was dismissed.[5]

The trial ended in the conviction of the accused persons, and Bhagat Singh was one of those who were sentenced to death. He, with some others, applied to the Privy Council for special leave to appeal. In dismissing the petition for special leave, Viscount Dunedin, who delivered the judgement of the Board, said,

'The petitioners ask this Board to find that a state of emergency did not exist. That raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any

[1] Des Raj v. The Crown, *Indian Law Reports* (Lahore), vol. XII (1931), p. 35.

[2] ibid., p. 40.

[3] ibid., pp. 42-3.

[4] ibid., pp. 43-5.

[5] ibid., p. 49.

exact definition :—It connotes a state of matters calling for drastic action which is to be judged as such by some one. It is more than obvious that that some one must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General.'[1]

Continuing, his Lordship observed :

'It was next said that the ordinance did not conduce to the peace and good government of British India. The same remark applies. The Governor-General is also the judge of that. The power given by Section 72 is an absolute power, without any limits prescribed, except only that it cannot do what the Indian legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity where the good government of India demands it.'[2]

The Privy Council thus conclusively decided that, under the law, the Governor-General alone was the judge of the existence of emergency and of the necessity of an ordinance for peace and good government. Mr Justice Bhide's contention, though plausible, is not tenable. The ordinance-making power of the Governor-General is not analogous to the power of subordinate legislation as in the case of the regulations under the Defence of the Realm Act. On the contrary, it is on a par with the legislative powers of the Indian Legislature. Hence the test of reasonableness cannot apply in the case of an ordinance as in that of subordinate legislation. It also follows as a corollary that the maxim '*delegatus non potest delegare*' is inapplicable, and the Governor-General can, by means of an ordinance, confer upon subordinate authorities the power of subsidiary legislation. And in fact, very wide rule-making powers were so given by many of the ordinances. The Governor-General's power is indeed 'an absolute power' which may be exercised either for good or for evil and may be used to deprive the subjects of any right of person or property

[1] Bhagat Singh v. The King-Emperor, *Indian Law Reports* (Lahore), vol. XII (1931), pp. 283-4.

[2] ibid., p. 284. His Lordship added that as a matter of pure law, it was not even incumbent upon the Governor-General to expound the reasons which induced him to promulgate an ordinance. ibid., p. 285.

they hold sacred.[1] The only limitation is in the conscience of the Governor-General and of his official superiors and, as in an autocracy, in the temper of the recipients of these executive orders.

It must, however, be remembered that an ordinance has only a limited life—it cannot be in force for more than a space of six months. This provision was made in 1861 when there was constituted a legislative council, small in number, without any pretension to any representative character, and with the Executive dominating it. The serious and extraordinary character of the power was fully realized and the short life of six months was a compromise between the demands of an unforeseen emergency, like the Sepoy Revolt of 1857, and the need for a check on absolute legislative power exercisable by a single individual. The object, therefore, was to vest in the Governor-General the power of immediate legislation to meet a sudden unforeseen situation. A period of six months gave enough time either to let the abnormal situation pass away, or to have a law passed in the normal manner to deal with it, should it still continue.

During the second Civil Disobedience Movement several ordinances[2] came into existence in quick succession and were, on the eve of the expiry of their life, renewed by a consolidated ordinance.[3] Justifying this action, Sir (then Mr) Harry Haig, Home Member, remarked : 'As the period for their expiry approached, it became evident[4] that we were in no position to discard the weapons with which the civil disobedience movement was being fought. Accordingly, at the end of June [1932], the Governor-General issued a new consolidated ordinance'.[5] This procedure was the subject of considerable

[1] Referring to the ordinance-making power of the Governor-General, Lord Reading observed that on his appointment he was almost staggered to find that he 'had the power to issue an edict . . . which could override the law of the land and every Statute passed in the land, which had the force of a Statute and could not be discussed in the Assembly or in the Legislature unless I chose to allow it.' Speech in the Lords on the motion for the appointment of a Joint Select Committee on the White Paper on Constitutional Reforms, 1933. Vide *House of Lords Debates*, 6 April 1933, vol. 87, coll. 424-5.

[2] These were issued between November 1931 and the first week of January 1932.

[3] The Special Powers Ordinance of 1932.

[4] There was, then, no emergency in the usual sense of that word.

[5] *L.A.D.*, 1932, vol. V, p. 1127.

criticism in India. In the Assembly two points were made against it: firstly, it was contended that the renewal of an ordinance was against the spirit, if not the letter, of Sec. 72 of the Act; and, secondly, that the procedure was an affront to the Assembly which ought to have been approached with a proper Bill if the Government regarded the continuance of the provisions of the ordinances as necessary. As Sir Abdur Rahim put it,[1] 'Emergency must be understood in its ordinary English sense. That is to say, if the ordinary body, whose function and responsibility is to enact laws, is not meeting at the time and is not available in order to enact the necessary law to meet a particular emergency, then and then alone His Excellency the Governor-General, in order to save the situation, can pass an appropriate ordinance. It is not, therefore, the intention of the Government of India Act that while there is every opportunity for the Government of India to bring a proper Bill before this Assembly, the Governor-General should pass an ordinance to take the place of a regular enactment.'

Whether, in law, an ordinance may be renewed after the statutory maximum period has expired is a difficult question to answer. Under the Act, the ordinary and normal legislative authority is the Indian Legislature. Every law that is proposed to be enacted must come up before the Legislature; it is then enacted with or without its approval. The only two exceptions are the regulation-making power of the Governor-General in Council in respect of certain backward tracts,[2] and the ordinance-making power of the Governor-General.

The power to make ordinances is surely a most extra-ordinary power, absolutely autocratic in nature. Its use has to be justified on the ground of compelling necessity. The presence of the ordinance-making power alongside the power of legislation by certification clearly indicates that its use is contemplated where time is the deciding factor, that is, where the Legislature cannot be consulted.

[1] *L.A.D.*, 1932, vol. V, p. 1572. See also the criticisms by Mr B. R. Puri, ibid., pp. 1389-90. Mr Puri cited the procedure followed by Lord Irwin in respect of the Press Ordinance of 1930 which was placed before the Legislature in the form of a Bill when it assembled after the promulgation of the ordinance.

[2] Government of India Act, Sec. 71. This is no longer in force.

The expression 'for the space of not more than six months from its promulgation' is significant. An ordinance may be made to be in force for a shorter period, but it must not exceed six months. The exact period will depend upon the circumstances, while six months is a long enough period to enable an Act to be passed if that is thought necessary. The clause also provides that the ordinance 'may be controlled or superseded by' an Act of the Indian Legislature. This contemplates the bringing of the ordinance in the form of a Bill before the Legislature. There is also the question whether an emergency remains an emergency when it can be seen and foreseen. Besides, if it is conceded that an ordinance may be re-promulgated for a second time, there is no reason why it may not be renewed a third time, and so on. And as the scope of the ordinances is as wide as that of Acts of the Legislature, such an interpretation would mean a total eclipse and practical supersession of the Legislature.

It is, therefore, submitted that there is a very strong case in favour of the view that an ordinance ends after six months and cannot be renewed. Such renewal undoubtedly militates against constitutional propriety. In view of the powers of the Governor-General under Sec. 67B the proper constitutional procedure in respect of the continuance of the provisions of any ordinance is to incorporate them in a Bill, give the Legislature an opportunity to express its views and then enact it by certification, if necessary. It is no doubt true that the latter procedure is more cumbersome, makes the Government liable to strong criticisms at the hands of the non-official Members of the Legislature and puts them on their defence. From the point of view of the Executive the ordinance-procedure is quite simple and effective. Everything can be and is done in absolute secrecy; there is no prior criticism from any quarter and the victims may be taken entirely unawares. But that is no valid reason for resort to such methods. For that is the method suitable for, and followed by, autocracies and dictatorships, while representative or democratic government postulates discussion, criticism and publicity.

Another question of an allied character is: how far is

it proper to legislate by ordinance when the Legislature is in session, or immediately before or after its sittings? As a matter of fact about 12 ordinances were issued when the Legislature was in session and 5 ordinances were issued immediately before or after a session. And a large number of ordinances giving extraordinary powers to the Executive was promulgated by Lord Willingdon during the periods between the close of the special November session in 1931 and the commencement of the winter session in January 1932 and the close of the latter and the commencement of the Simla session in 1932.

The issue of an ordinance is clearly unjustifiable when the Legislature is in session unless there is overwhelming reason to the contrary. Thus the first Currency Ordinance of 1931 was justified because there was hardly any time to come to the Legislature, for, as Sir G. Schuster put it, Government had only an interval of 90 minutes between the receipt of the news from England and the opening of the Exchange Market.[1] But the repeal of this ordinance by the second Currency Ordinance of 24 September stands on a different footing. That could be effected by a repealing Act. Similarly, Ordinances Nos. I and II of 1935 were justified because the Finance Bill of that year was not passed before the end of March and consequently, but for these ordinances, certain sources of revenue could not be tapped.

On 4 November 1931 the Governor-General issued the Kashmir Ordinance. On the same day the Assembly also met for its special session. It is not unreasonable to hold that the more appropriate procedure would have been the introduction of a Bill in the Legislature. Surely, the delay of a day or two would not have made any fatal difference in the situation.

A large number of ordinances was issued shortly before or after a session. The Public Safety Ordinance, 1929, was promulgated on the day on which the Legislative Assembly was prorogued. This was however an unusual case. The President of the Legislative Assembly had, on technical grounds, but wrongly, refused to allow further consideration

[1] See *L.A.D.*, 26 September 1931.

of the Public Safety Bill. As Government thought that the law was urgently required and were not prepared either to wait until the termination of the Meerut Case or to withdraw the case and proceed with the Bill, the only alternative was the issue of an ordinance. Whether it was expedient or justified in the circumstances is, however, another matter. The Unauthorized News-sheets and Newspapers Ordinance of 1930 and the Foreign Relations Ordinance of 1931 were issued five days before and four days after the session of the Legislative Assembly respectively. It appears that there would not have been much harm if the first legislation were delayed by about a week. As to the second, it is not clear how in four days the emergency developed.

The special session of the Legislature ended on 20 November 1931 and the regular winter session began on 25 January 1932. During this period as many as ten ordinances were brought into existence. These ordinances were most drastic in nature and extremely wide in character and became the subject of strong criticism in India. Soon after the commencement of the Delhi session in 1932, Sir H. S. Gour moved a resolution in the Assembly on the 'Recent Ordinances' asking the Government, *inter alia*, forthwith to bring before the Legislative Assembly a Bill incorporating such provisions of the ordinances as were considered necessary. He pointed out that immediately after the conclusion of the Assembly in November 1931 the ordinances were promulgated one after another in quick succession. Since Government must have anticipated trouble, he maintained, they should have brought forward the measures contemplated before the Legislative Assembly. To this Sir George Rainy replied : 'Had we come forward with emergency proposals of that kind not to meet an actual emergency but a possible one, the House would have refused, and I think rightly refused, to arm us with powers to meet a contingency which has not yet arisen.'[1] On the face of it, the plea was quite sound. In fact, however, the subsequent attitude of Government, especially Lord Willingdon's definitely curt and stiff attitude towards Mr Gandhi would make one inclined to believe that

[1] *L.A.D.*, 1932, vol. I, p. 282.

Government must have known that the clash was bound to come, and the swift manner in which they acted when the Civil Disobedience Movement was revived, clearly indicates that Government had previously kept themselves in complete readiness for the emergency. In the circumstances, the real motive presumably was to hit the Congress unawares.

To the further criticism that Government should have summoned a special Session soon after the resumption of the Civil Disobedience Movement in order to pass an Act incorporating the ordinances, Sir G. Rainy's reply was two-fold. Firstly, such procedure, he said, would involve loss of time. Government were so busy in dealing with the situation in the country that they could not, he argued, waste time on discussion in the Legislature. Surely this argument was unsound. If there was an emergency which required drastic use of a dictatorial power, the Legislature ought to have been appraised of the situation and given an opportunity to express its own opinion. Secondly, Sir George argued that the attitude of the Legislature was known to be hostile.[1] As Sir Hugh Cocke, Leader of the European Group, put it, 'I think it is obvious that it is impossible for this Government, as it is constituted at present, to expect the powers they require from this House'.[2] In pursuing this line of argument Sir George and Sir Hugh were clearly wrong. Granting that the Assembly would have turned down the proposals of the Government, there was ample provision for that contingency in the constitution. The obvious remedy in such event was surely legislation by certification under Sec. 67B. of the Act.

[1] *L.A.D.*, 1932, vol. I, pp. 282-3.
[2] ibid., p. 223.

PART II

THE GOVERNOR-GENERAL UNDER THE GOVERNMENT OF INDIA ACT, 1935

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THE GOVERNMENT OF INDIA ACT, 1935 —GENERAL FEATURES

THE Government of India Act of 1935[1] is a very lengthy and complicated statute. This was inevitable, partly because it dealt with a highly complex type of federal constitution, and partly because it sought to employ all the powers and ingenuity of draftsmanship to provide legal safeguards against misbehaviour on the part of the Indian Ministers and legislators.

The basic features of the Act are (1) All-India Federation, (2) Central responsibility, (3) Provincial Autonomy and (4) Safeguards.

The conception of federation required a complete reconstruction of the Indian Constitution and the repeal *in toto* of the Government of India Act.[2] For that Act was exclusively concerned with the Government of British India for which it provided, in essence, a unitary constitution. The federation proposed is not a federation of a unitary British India and of such Indian States as may join it, but it is a federation of which the component units are the eleven autonomous Provinces of British India[3] and as many Indian States as become members of it.

[1] For a summary of the steps leading up to the Act of 1935, see Keith, *A Constitutional History of India*, ch. IX.

[2] Except, curiously enough, the preamble to the Government of India Act, 1919.

[3] These are Madras, Bombay, Bengal, the United Provinces, the Punjab, Central Province and Berar, Assam, Bihar, Orissa, N.W.F. Province and Sind. The Chief Commissioners' Provinces, like Delhi or British Baluchistan, are not in reality units of the Federation in the accepted sense of that term, although they are so termed by the Act. See Sec. 311 (2).

The question of federation presented a peculiar problem in view of the disparity between the units—disparity in legal status as well as in internal political structure. In theory, the Provinces had no original or independent powers to surrender to the Centre. In their case federation meant accession of power from the Centre. On the other hand, the Indian States are not part of His Majesty's dominions though they are under his suzerainty. In their case federation meant transference of power to the Federal authority. Federation, therefore, would apparently mean gain to the Provinces and loss to the States. Much too great an emphasis was laid on this point by the protagonists of the Indian States. In practice, however, the difference was much less than it appeared to be. For although, in law, the Provinces had no independent status, they were, in fact, since 1921 largely independent of Central control in a wide sphere of their activity. They were almost completely free in the transferred sphere, they had separate sources of revenue, and in respect of legislation they had a field of their own in which the Central Legislature seldom interfered. On the other hand, the Indian States were, and are, through the instrumentality of Paramountcy, in a very real degree controlled by the Government of India. In fact they have frequently complained bitterly against what they regard as high-handed and arbitrary interference by the Paramount Power. They have no part in Indian legislation though they are often prejudicially affected by it. Besides, the Rulers of the Indian States have sometimes to abdicate or go into voluntary exile, and many of the States are often forced to carry on their administration either through officials chosen by the Government of India or according to plans approved by it. Indeed, it is permissible to hold that the control of the Political Department over the Indian States has been as tight as, and certainly more arbitrary and peremptory than, that of the other Departments of the Government of India over the Provinces. By entering the Federation the Rulers will escape the grip of Paramountcy in the sphere that is transferred to the Federal Government, while their entrenched position in the Federal Legislature and Executive will give

them a strong and perhaps decisive voice in the administration of those subjects. Therefore, in fact, the loss of the States is not so great as it appears to be and the Provinces do not gain as much as they seem to do.

In view, however, of the theoretical disparity in status between the Provinces and the States, their entry into the Federation will be by different means. The Act of Parliament automatically makes the Provinces so many units of the Federation ; but Parliament does not legislate for the States and cannot, therefore, incorporate them within the Federation. Entry into the Federation is a purely voluntary action on the part of each State however small and insignificant it may be. This entry is to be signified by the execution of an Instrument of Accession to the Federation by the Ruler of a State in favour of the Crown. On acceptance of that Instrument the State will become a unit of the Federation.[1]

Another consequence, but not necessarily a logical or desirable one, of this disparity of status is that, while the Provinces are all alike in respect of the possession of the quantum of legislative and executive powers in the Federation, the States will, in all probability, differ, not only from the Provinces but also among themselves, as to the extent of their powers in the Federation. The scope of Federal jurisdiction in the States will depend solely upon the transfer made by their respective Rulers through their Instruments of Accession. In the result there will be three distinct categories of subjects—(*a*) Federal, (*b*) Central or British Indian, (*c*) Provincial. Differential treatment of the units of a Federation, founded on no solid and rational principle, is likely to weaken the Federal scheme by giving rise to mutual jealousy and considerable administrative and legislative inconvenience.

To guard against the entry of a State without substantial transfer of authority to the Federal Government and Legislature, it is provided that such entry is conditional upon the acceptance by the Crown of the Ruler's Instrument of Accession. And the Crown is forbidden to accept an Instrument if its terms appear to be inconsistent with the scheme of

[1] Sec. 6 (1).

federation. By the Instrument of Accession the Ruler authorizes the various Federal authorities, established by or under the Act, to exercise their respective functions under the Act in relation to his State in respect of the matters assigned by it, but subject to the conditions therein laid down.[1] He also assumes the obligation of ensuring that due effect is given within his State to the provisions of the Act, so far as applicable thereto by virtue of this Instrument. This document will specify the subjects in respect of which the Ruler surrenders to the Federal Legislature the right to legislate for his State, and the limitations, if any, to which the power of the Federal Legislature to make laws for his State and the exercise of Federal executive authority therein, are to be subject. The Ruler may, by a subsidiary Instrument, extend the functions of the Federal authority in respect of his State. Every Instrument must provide that certain provisions[2] of the Act may be amended by or by authority of Parliament without affecting the accession of the State. But no such amendment can extend the functions of the Federation in relation to his State unless so accepted by a subsequent Instrument. A reference to the second schedule will make it clear that the provisions which can be so amended are of comparatively minor importance from the standpoint of Indian self-government. In view of the very express stipulation made from the outset by the spokesmen of the States that their adherence to the Federation was conditional upon the grant of responsible government at the Centre, it is hard to explain why any amendment of the Act, say, transferring the Reserved subjects to the hands of Ministers or abolishing the special responsibilities of the Governor-General except in respect of the States, should be regarded as inconsistent with their accession. This provision undoubtedly will be an additional bar to the extension of real self-government in India.

A second important problem arises out of the disparity in the internal political organization of the Provinces and the States. The Provinces have a democratic framework and constitutional government. The States, on the other hand,

[1] Sec. 6.

[2] These are enumerated in the Second Schedule.

are pure autocracies, a few of which are, on the whole, benevolent, but the large majority of which are not so. In none of them is there any proper representative government, not to speak of responsible government. In consequence of this disparity the British Indian element in the Federal Government and Legislature will derive their mandate from the electorates but the State element will be nominees of the Rulers of the States. This difference is bound to have important repercussions on the effectiveness of popular will in the Federal Government.

All powers exercisable by any authority in India are, by the Act, transferred to the Crown and then re-transferred to the Governor-General, Governors and other appropriate authorities, the powers hitherto exercised by the Governor-General in Council in relation to the Indian States, except in so far as they are transferred to the Federal authorities by the Rulers thereof, being vested in the Viceroy in his distinct capacity as Crown Representative. The Governor-General as head of the Federation and the Governors as heads of Provinces derive powers by direct delegation from the Crown.

The Federal Government vests in the King, represented by the Governor-General who possesses all such powers as are given to him by or under the Act and any of the prerogatives of the King that may be delegated to him.[1] The Act dissolves the long-established unity of the Government of India represented by the Governor-General in Council and establishes a dyarchy in its place. Certain Federal subjects are reserved in the hands of the Governor-General to be administered by him with the assistance of not more than three counsellors to be appointed by him. These subjects are Defence, External affairs, Ecclesiastical affairs, and the Administration of the tribal areas.[2] In the administration of the other Federal subjects the Governor-General is 'to be aided and advised' by a Council of Ministers, not more than ten in number.[3] In other words, the Federal Ministry is to administer all Federal Departments except the Departments dealing

[1] Sec. 3. [2] Sec. 11. [3] Sec. 9 (1).

with those enumerated subjects. In the ministerial field, however, the Governor-General will have a number of special responsibilities and whenever in his judgement any of these is involved, he has the right to act against the advice tendered by the Ministry. These special responsibilities are not reserved departments but are designed to secure certain purposes or objectives and may, therefore, arise in any Department. Further in respect of certain other specific matters the Governor-General is to act in his discretion. Besides, the control over currency as well as railways is practically taken out of the hands of the Federal Ministry by the creation of the Reserve Bank and a Federal Railway Authority.

The Federal Ministry will be formed on the usual Cabinet lines, except that it will include representatives of the States who are nominees of their Rulers and representatives of important minorities. The inclusion of neither of these categories is obligatory under the Act but the Governor-General is instructed, so far as possible, to secure such representation. Notwithstanding the composite character of the Ministry it is important to note that their responsibility will be collective. The Council of Ministers will be responsible to the Federal Legislature, in practice, to the House of Assembly.

The Federal Legislature consists of His Majesty, represented by the Governor-General, and two Chambers to be known as the Council of State and the House of Assembly or the Federal Assembly. The Council of State is to consist of 156 representatives of British India and not more than 104 representatives of the Indian States. The Federal Assembly is to consist of 250 representatives of British India and not more than 125 representatives of the Indian States.[1]

The Council of State, unlike the present one, will be a permanent body of which one-third will retire every three years. On the other hand, the Assembly, unless earlier dissolved, has a life of five years from the date of its first meeting. On the expiry of that period it will be automatically dissolved. The Governor-General will have no right to

[1] Sec. 18.

extend its life as he had under the Government of India Act.[1] The Governor-General in his discretion will have the right of summoning and proroguing the Chambers and of dissolving the Federal Assembly.

Of the 156 British Indian Members of the Council of State, 150 will be directly elected and the remaining six nominated by the Governor-General. In making his choice the Governor-General will be expected to redress, so far as possible, inequalities of representation resulting from election: to secure due representation for the scheduled castes, women and minority communities.[2] Originally, when it was proposed to give the Governor-General the right of nominating a few Members, the idea was to secure in the Upper Chamber a 'small group of the elder-statesman type'.[3] Now that the Governor-General is to fill these seats for other purposes, there is hardly enough justification for giving him this power which, in practice, is likely to be weighted for or against the Federal Ministry of the day.

There are 75 general seats, 6 seats for scheduled castes, 4 for the Sikhs in the Punjab, 49 for Muslims, 6 for women, 7 for Europeans, 2 for Indian Christians and 1 for Anglo-Indians. The European, Indian-Christian and Anglo-Indian seats are to be filled indirectly by the respective categories of Members of the provincial legislatures. The rest are to be elected by constituencies of very restricted franchise.[4]

The actual number of representatives of the States depends on the number[5] of States joining the Federation. But so long as 10 per cent of the possible State-seats remain unfilled, the nominees of the States are entitled to choose members for as many as half the number of seats vacant. For instance, if the acceding States are entitled to fill, say, 70 seats, then these 70 nominees of the States may appoint as many as 17 additional Members. The same principle is applicable in respect of State representation in the Assembly. This privilege

[1] Sec. 63D (*b*), continued in force during the transitional period.
[2] See Appendix D, Clause XXX, post.
[3] *The White Paper*, Introduction, par. 18.
[4] 1st Sch., pt. I.
[5] The First Schedule of the Act fixes the quota of the different States.

is to continue for 20 years.[1] Obviously it is most unfair to British India.

The State members of the Federal Assembly are all nominees of the Rulers. The British Indians are to be indirectly elected. The original provision for direct election was negatived on the recommendation of the Joint Committee.[2] This change was made on the ground that it was vitally necessary to maintain contact between the Member and the electorate and that this was impossible under direct election. The real motive, however, that inspired this change was the expectation that it would prevent the extreme nationalists from capturing a large number of the elected seats. The Hindu, Muhammadan and Sikh Members are to be elected by the respective groups in the Provincial Assemblies, voting by the method of the single transferable vote. The British Indian seats are allotted as follows : General seats 105, of which 19 are reserved for the scheduled castes, Sikhs 6, Muhammadans 82, Anglo-Indians 4, Europeans 8, Indian Christians 8, Commerce and Industry 11, Landholders 7, Labour 10, Women 9.[3] It will be seen that special economic interests get representation in the Lower Chamber but not in the Upper.

The powers of the Indian Legislatures are severely restricted. Apart from the distribution of powers inevitable in a federal constitution, there are certain subjects on which neither the Federal nor the Provincial Legislatures can legislate. Thus the Indian Legislatures are debarred from making any law affecting the Sovereign or the Royal Family or the Succession to the Crown, or the sovereignty, dominion or suzerainty of the Crown in any part of India, or the law of British nationality, or the Army Act, the Air Force Act, or the law of Prize or Prize Courts. Except in so far as is expressly permitted by specific provisions of the Act, they cannot make any law amending any of its provisions or any Order in Council made under it, or any Rules made thereunder by the Secretary of State or by the Governor-General or a Governor in his

[1] 1st Sch., pt. II.
[2] See *Report*, vol. I (pt. I), pars. 200-1.
[3] 1st Sch., pt. I.

discretion or in the exercise of his individual judgement ; nor can they make any law affecting the prerogative right of the Crown to grant special leave to appeal to the Privy Council except in so far as is expressly permitted by the Act.[1] Further, very severe limitations are imposed on the Indian Legislatures in order to prevent legislation discriminatory to British interests in commercial and other spheres.[2] Besides, there is a large number of subjects of vital importance on which initiation of legislation requires previous sanction of the Governor-General in respect of Federal legislation and of the Governor-General or the Governor in respect of Provincial legislation.[3]

The estimated annual receipts and expenditure of the Federation are to be laid before the Indian Legislature. Certain items of expenditure are charged on the revenues of the Federation and are to be shown separately from the rest of the expenditure.[4] The former are non-votable and constitute the bulk of the expenditure of the Federal Government. The main heads of expenditure in this category are : the salary and allowances of the Governor-General ; interest, sinking fund charges, etc. on the debts of the Federation ; salaries and allowances of Ministers, Counsellors, the Financial Adviser, the Advocate-General and Chief Commissioners ; salaries, allowances and pensions of Federal Court judges ; the expenditure for the Reserved Departments, and for discharging the functions of the Crown in respect of Indian States. These non-votable items are, however, open to discussion except those relating to the salary, allowances, etc, of the Governor-General and the expenditure incurred for discharging the functions of the Crown in respect of the Indian States. If the Legislature rejects or reduces any demand for a grant the Governor-General may restore it in full or in part if he thinks that the amount is necessary for the due discharge of any of his special responsibilities.[5]

The two Chambers have nearly co-equal powers and any Bill, except a financial Bill, may be introduced in either

[1] Sec. 110. [2] Secs. 111-21. [3] e.g. Sec. 108.
[4] Sec. 33. [5] Sec. 35.

Chamber. The demands for grants are to be submitted first to the Assembly. Either Chamber has power to assent or refuse to assent to any demand or to reduce it. Where the Assembly rejects any demand it cannot be submitted to the Council of State unless the Governor-General so directs; and where the Assembly reduces a demand the Council of State is to be asked to sanction the reduced demand only, unless the Governor-General otherwise directs; and in so directing the Governor-General may specify any amount not greater than the original demand. If the Chambers differ with respect to any demand, the Governor-General is required to summon a joint sitting for voting on that demand and the decision of the majority is to prevail.[1]

A Bill is normally regarded as passed when it is passed by both Chambers. The Governor-General may summon a joint sitting when a Bill passed by one Chamber is rejected by the other, or is amended in a form to which the first Chamber is not agreeable, or more than six months elapse from the date of the sending of the Bill to the other Chamber without being presented to the Governor-General for his assent. But the Governor-General may, in his discretion, summon a joint sitting, notwithstanding the non-fulfilment of any of these conditions, where the Bill relates to finance or to any matter affecting any of his functions to be discharged in his discretion or in the exercise of his individual judgement. In the former case the joint sitting may be held in the next session after the expiry of six months from the date of the notification of the Governor-General's intention to convene it. In the latter case the joint sitting may be held at any time.[2]

After a Bill is passed by the Chambers, the Governor-General, in his discretion, may assent to it, or veto it or send it back for reconsideration or reserve it for His Majesty's consideration. Any Act assented to by the Governor-General may be disallowed within a year by the King in Council.

One of the chief features of the Act is the introduction

[1] Sec. 34. [2] Sec. 31.

of Provincial Autonomy. This expression, as understood in Indian political parlance, means two things: (1) possession by a Provincial Executive and Legislature of exclusive authority within the Province in a precisely defined sphere in respect of which they are broadly free from control by the Central Government and Legislature; and (2) responsibility of the Executive to the Provincial Legislature within that sphere. The Act has conceded this Autonomy in a large measure to the eleven Governor's Provinces it has created. The Governor-General as the supervising authority over the Governors has, however, very important powers of control in the Provincial sphere.

There is no dyarchy in the Provinces. The Governor, as representing the King, is the head of a Province and executive actions of the Government run in his name. He is 'aided and advised' by a Council of Ministers responsible to the Provincial Legislature.[1] The entire field of Provincial administration is in Ministerial hands, except where the Governor is required to act in his discretion. The Governor is to be guided by the advice of the Ministry unless so to be guided would be, in his judgement, inconsistent with the fulfilment of any of his 'special responsibilities.'[2] In respect of a totally excluded area, if any, the Governor is to act in his discretion.[3] Save as to this, there is no subject of Provincial Government which is withdrawn from the purview of the Ministry. The other discretionary powers that the Governor has, relate not to any subject or department of Government but to certain specified matters, such as the appointment of Ministers and the summoning or dissolving of the Legislature. Like the Governor-General, the Governor has certain 'special responsibilities', and like him, again, he has all powers, legislative, executive and financial, effectively to fulfil any of his special responsibilities or any other function which is exercisable in his discretion or individual judgement.

The Legislature is bicameral in Madras, Bombay, Bengal, the United Provinces, Bihar and Assam and unicameral in the other Provinces.[4] The duration of the Chambers

[1] Sec. 50. [2] Sec. 52. [3] Sec. 92. [4] Sec. 60.

is as in the Centre. The Governor has the same rights in respect of the Legislature as the Governor-General has in respect of the Federal Legislature.

The Lower House or the Legislative Assembly is entirely elected and represents communal as well as special interests. The Upper House is constituted by election on communal lines with a few nominations by the Governor, except that in Bengal and Bihar some seats are filled by the Assembly by means of the single transferable vote.[1]

The Act makes a division of legislative power between the Federation and the Provinces. There are three very elaborate lists—(1) the Federal list, (2) the Provincial list and (3) the Concurrent list. The first two lists are exclusively within the jurisdiction of the Federal and Provincial Legislatures respectively. Normally a Federal Act in the third sphere prevails over a Provincial Act, but the latter is valid where it is reserved for, and is assented to by, the Governor-General. The residuary powers would be assigned by the Governor-General, as occasion arose, either to the Federal or the Provincial Legislature.[2]

The Act establishes a Federal Court with jurisdiction over the States as well as the Provinces. The Court, as at present constituted, consists of a Chief Justice and two puisne judges. It has both original and appellate powers.[3]

The Act provides most elaborate safeguards to secure the vested and contingent interests of the civil servants, particularly of those belonging to what are known as the Imperial Services. The Secretary of State is to continue to recruit for the key services, namely the Indian Civil Service, the Indian Medical Service and the Indian Police Service. Apart from specific provisions, the duty is imposed upon the Governors, the Governor-General and the Secretary of State to safeguard the equitable interests of the members of these Services. No Government Service in any other country is given a modicum of the statutory guarantees that have been given to these Services in India.

[1] 5th Schedule. [2] Secs. 100-7. [3] Pt. IX, chap. I.

The Act abolishes the Council of the Secretary of State. Instead he has Advisers, who may or may not be consulted, and whose advice may or may not be followed, except in regard to his duties in respect of the Services.[1] This provision, like many other provisions of the Act, is a Conservative Government's insurance against any leniency on the part of a future Socialist Secretary of State.

In the exercise of powers, individual judgement and discretioning the Governors, through the Governor-General, and the Governor-General himself, are strictly responsible to the Secretary of State.

The last, but by no means the least, important feature of the Act is the provision of elaborate safeguards. These safeguards, indicated in the foregoing pages, are vital subtractions from the principle of responsible government as well as of self-government. These are mainly of two types—firstly, there is the denial of legislative powers to the Indian Legislatures in regard to a large number of subjects; secondly, there is the grant of powers to the Governor-General or the Governors to override their Ministers and Legislatures in certain circumstances, including, in the event of any breakdown of the constitution, absolutely dictatorial powers.

The Act does not touch upon the question of the relation between the Crown and the Indian States, except that it specifically takes that matter out of the hands of the Federal Government including the Governor-General. The Crown's functions in this behalf are to be discharged in India by its Representative, who in fact is the Viceroy himself. To the domain of the Crown Representative belong the functions hitherto performed by the Governor-General in Council in respect of Indian States—the whole of those functions as to non-federating States, but only those functions, as to federating States, which are not handed over to the Federal Government and Legislature by the Rulers of those States.

The Act envisages the Governor-General as the corner-stone of the entire constitutional structure of India—giving

[1] Sec. 278.

unity and direction to its diverse and often conflicting elements. He is expected to keep the ship of State on an even keel and to protect a variety of British vested interests in India. He is the predominant part of the whole structure, armed, in case of necessity, with full and plenary powers of the amplest dictatorial character, but subject to the supervision and control of the Secretary of State and ultimately of Parliament.

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THE POWERS AND DUTIES OF THE GOVERNOR-GENERAL

THE Governor-General, as we have seen, is appointed by Commission under the Royal Sign Manual.[1] The offices of the Governor-General and of the Crown Representative have been created by separate Letters Patent. The two offices are entirely distinct, but under the terms of the Letters Patent constituting the latter office the Governor-General of India is also the Representative of the Crown in its relations with the Indian States. Thus the Commission of Lord Linlithgow appoints him as Governor-General of India and Crown Representative. He is also, while in India, the King's Viceroy.

The Viceroy as such has no statutory recognition nor has he any statutory or delegated powers.[2] The term gives the Governor-General the status of personal representative of the King. But even without the use of this word the Governor-General may be as fully the personal representative of the King as with its use. Thus the Governor-General of a Dominion to-day is in a fuller sense the King's personal representative than the Viceroy of India, for the former is in no sense the agent[3] of the British Government, while the latter definitely is; and yet the use of the word 'Viceroy' has never been necessary in the case of the King's representative in a Dominion. Under the new Constitution, however, the term 'Viceroy' has one important significance: while the

[1] Sec. 3. See chap. 1, ante.

[2] Except that the power of conferring Indian titles has been vested by Royal delegation in the Viceroy. See p. 29, note 3.

[3] cf. 'The Governor-General of a Dominion is the representative of the Crown . . . and he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.' Report of the Imperial Conference of 1926. Vide Keith, *Speeches and Documents on the British Dominions*, pp. 164-5.

single term 'Governor-General' or 'Crown Representative' does not cover the dual capacities of the King's representative in India, the term 'Viceroy' does. It must, however, be noted that in the discharge of the functions of Governor-General or Crown Representative either of these terms, as the case may be, must be used. The Viceroy as such can discharge none of these functions. The term is, therefore, in law redundant, explainable only by its historical origin.[1]

In India the Viceroy has three distinct capacities: (1) he is head of the Federation of India, (2) he is the Crown's agent for the exercise of Paramountcy, and (3) he is the agent of the British Government and through it of the British Parliament.

To take, first, the powers and duties of the Viceroy and Governor-General in his capacity as head of the Federation of India. Section 2 of the Act declares that all rights, authority and jurisdiction hitherto belonging to the King in relation to British India and the Indian States and the tribal areas are exercisable by His Majesty, except in so far as otherwise provided by or under[2] the Act, or as otherwise directed by him. The rights, authority and jurisdiction of the Crown referred to above include any rights, etc., hitherto exercisable in or in relation to any territories in India by the Secretary of State, the Secretary of State in Council, the Governor-General or the Governor-General in Council, any Governor or any Local Government, whether by delegation from His Majesty or otherwise. In other words, the Act transfers to, and vests in, the Crown all the rights so long belonging to the authorities named above. The Crown thus becomes the repository of all executive powers.[3]

The Governor-General has (*a*) all such powers and duties as are conferred or imposed on him by or under the Act, and (*b*) such other powers of His Majesty, outside the sphere of relations with the Indian States, as His Majesty may assign

[1] See chap. 3, p. 27, ante.

[2] By Act of Indian Legislatures and by Orders in Council.

[3] The powers resumed into the hands of the Crown include the powers in relation to the Indian States. These are to be exercised by the Crown Representative, except in so far as they fall within the Federal sphere in respect of a State-Unit of the Federation.

to him.[1] It is thus quite clear that the Governor-General has only two categories of powers :

(*a*) Powers derived from the Act or under the Act—the latter phrase implying those granted by some competent authority under the Act, for example, by the Federal Legislature ; and

(*b*) Powers, if any, delegated by the King. The King can delegate one or more of his royal prerogatives ; he cannot, of course, delegate any of his statutory powers in respect of India.

In view of the resumption of all powers in the hands of the Crown and the express provision of Sec. 3 (1), it is no longer possible for the Governor-General to exercise any power or authority which cannot be clearly traced to either of the above sources. For example, after 1 April 1937, the Governor-General or, for the matter of that, the Viceroy, could not legally grant any of the Indian titles or honours which had been conferred by the occupants of that office over a long period, apparently by derivation from the Indian predecessors of the Crown. It was, therefore, found necessary expressly to delegate this power after Part I of the Act came into force on 1 April 1937.[2]

The legal powers of the Governor-General are thus either statutory or delegated. The former cover a wide range and will be stated presently. The delegated powers of the Governor-General are not many. These are :[3]

(*a*) The power of pardon.
(*b*) The grant of commissions in Indian Defence Forces.
(*c*) The grant of Indian titles and honours.
(*d*) The administration of oaths of office and secrecy to the members of the Council of Ministers.[4]

It will be seen that the Governor-General has not, by delegation, any of the other royal prerogatives, such as the right of making war and peace, concluding treaties, and sending or receiving ambassadors.

[1] Sec. 3.

[2] See *ante*, ch. 3, p. 29, note 3.

[3] These have already been explained. Vide Ch. 3 *ante*. The power of granting titles now really belongs to the Viceroy and not the Governor-General. See p. 252, note 2.

[4] See Appendix D., Cl. IV.

The Governor-General's position as head of the Federation of India has two aspects : (*a*) he is the direct official head of the Federal Government, (*b*) he is also a mediator or umpire between the Federation and its Units and has, in addition, considerable powers of control over the Units. We begin by considering his position as head of the Federal Government. His powers and duties in this capacity may be classified as administrative, financial and legislative.

The Governor-General as Executive Head of the Federation

The Crown is the executive head of the Federation as well as of the Provinces, but Secs. 7 (1) and 49 (1) make the executive authority in the two spheres exercisable by the Governor-General and the Governors respectively on behalf of His Majesty. Thus the Act explicitly excludes the King from direct participation in Government, either Federal or Provincial.

Under the old Act the executive authority of British India was vested in the Governor-General in Council subject, of course, to the superintendence, direction and control of the Secretary of State. Under the new Act, but subject to its provisions, the executive authority of the Federation is to be exercised, on His Majesty's behalf, by the Governor-General, either directly or through subordinate officers. This will not, however, debar the Federal Legislature from conferring executive functions upon subordinate authorities, or be deemed to transfer to the Governor-General any functions conferred by any existing Indian law on any court, judge or officer or any local or other authority.[1] In other words, all executive authority in the Federal sphere belongs to the Governor-General and is exercisable by him either directly or by agents, except in so far as it is vested specifically in some other authority by any existing law or by the Federal Legislature.

The executive authority of the Federation extends to all matters in respect of which the Federal Legislature has power to make laws, to the raising in British India of naval, military and air forces on behalf of the Crown, the governance of the

[1] Sec. 7.

Crown forces borne on the Indian establishment, and the exercise of rights arising out of treaty, grant, usage, sufferance or otherwise in relation to the tribal areas. But this authority does not extend in any Province to matters in respect of which the Provincial Legislature has concurrent jurisdiction unless otherwise stated in the Act. Further, save as expressly provided in the Act, this authority is exercisable in a Federated State only in respect of matters on which the Federal Legislature has power to legislate for that State, subject to any limitations specified in its Instrument of Accession.[1]

The Governor-General is thus the executive head of the Federation and all executive actions of the Federal Government have to be expressed to be taken in his name.[2] In the exercise of his functions the Governor-General will be aided and advised by a Council of Ministers, except in so far as he is required to exercise any of his functions in his discretion.[3] The Act also imposes upon the Governor-General certain very wide and important special responsibilities in the Ministers' sphere, which he is to discharge in his individual judgement. Besides, there is a number of specific matters, administrative, financial and legislative, in respect of which the Governor-General is to act in his discretion or in the exercise of his individual judgement.

In respect of any matter in which the Governor-General is required by or under the Act to use his discretion the Ministers have no constitutional right to advise. In respect of matters in which the Governor-General is required to exercise his individual judgement the Ministry have the right to tender advice, but the Governor-General has the constitutional right to reject such advice. In respect of the exercise of all other powers vesting in the Governor-General the Ministers have the final voice.[4] For a proper appreciation of the scope of ministerial responsibility and of the Governor-General's powers it is necessary to have a complete and connected picture of the powers exercisable by the Governor-General in the various spheres of Government, either in his discretion or in his individual judgement.

[1] Sec. 8. [2] Sec. 17 (1). [3] Sec. 9.
[4] See pp. 293-6, post.

The Reserved Departments

First, as to the subjects to be administered by the Governor-General in his discretion.

Sec. 11 of the Act provides that the functions of the Governor-General in respect of defence and ecclesiastical affairs and with respect to external affairs, except the relations between the Federation and any part of His Majesty's dominions (including the United Kingdom), and in respect of tribal areas, shall be exercised by him in his discretion. Sec. 95 (1) provides that the administration of British Baluchistan shall be directed and controlled through a Chief Commissioner by the Governor-General in his discretion. Thus the ambit of authority of the Federal Ministry is much narrower than the jurisdiction of the Federal Government. The Federal subjects of defence, external affairs, tribal areas and ecclesiastical affairs constitute the Reserved Departments. The administration of British Baluchistan, however, is not a Reserved Department.

Under the subject 'defence' will come the matters which are now dealt with in the Defence Department.

Tribal areas practically mean the places lying between the North-West Frontier Province and the borders of Afghanistan.

The Department of External Affairs is also reserved to the Governor-General mainly because of the intimate connexion between foreign policy and defence. This Department deals with the relations of the Government of India with countries other than those included in the Empire. It controls both political and economic relations with foreign countries.[1]

The subject of ecclesiastical affairs is also reserved. The ecclesiastical expenditure of the Government of India which is ostensibly meant for ministering to the spiritual needs of the British troops and of the civil officials as far as possible, is indirectly a subsidy to the Christian Church in India in its proselytizing activities.

[1] Mr Krishnaswami says: 'The phrase "external affairs" has been advisedly used in a restricted sense applying only to the "political external affairs of the country."' In law, this statement is inaccurate. Non-political external affairs also fall within the purview of the Reserved Department of External Affairs, though in fact in these matters that Department will be largely influenced by the Responsible Ministry. See *The New Indian Constitution*, p. 120, by Krishnaswami.

In addition to the Reserved Departments,[1] there is another Department of the Indian Government which has recently been severed from it, namely, the Political Department. This is under the control of the Viceroy in his capacity as Crown Representative and might be better called the Crown Representative's Department. These Departments are responsible for the expenditure of about 80 per cent of the present Central revenues. Thus, judging by the standard of expenditure which is certainly a most important test, the sphere of activities of the Federal Ministry will be represented by about 20 per cent or one-fifth of the total expenditure. Constitutionally speaking, therefore, the scope of the activities of the Ministry will be very severely limited.

The Governor-General's Special Responsibilities

The next important category of powers belonging to the Governor-General and correspondingly limiting the authority of the Ministers is to be found in the special responsibilities of the Governor-General.

Sec. 12 provides that in the exercise of his functions the Governor-General shall have the following special responsibilities, that is to say :

(*a*) the prevention of any grave menace to the peace or tranquillity of India or any part thereof ;

(*b*) the safeguarding of the financial stability and credit of the Federal Government ;

(*c*) the safeguarding of the legitimate interests of minorities ;

(*d*) the securing to, and to the dependants of, persons who are or have been members of the public services, of any rights provided or preserved for them by or under this Act and the safeguarding of their legitimate interests ;

(*e*) the securing in the sphere of executive action of the purposes which Secs. 111 to 121 are designed to secure in relation to legislation ;

(*f*) the prevention of action which would subject goods of United Kingdom or Burmese origin imported into India to discriminatory or penal treatment ;

[1] The four reserved subjects will, in practice, constitute two Departments as at present—ecclesiastical affairs being dealt with in the Department of Defence and ' tribal areas ' in the Department of External Affairs.

(*g*) the protection of the rights of any Indian State and the rights and dignity of the Ruler thereof, and

(*h*) the securing that the due discharge of his functions with respect to matters in respect of which he is by or under the Act required to act in his discretion, or to exercise his individual judgement, is not prejudiced or impeded by any course of action taken[1] with respect to any other matter.[2]

On the first special responsibility the Joint Committee remarked : ' The Governor-General, as the authority in whom the exclusive responsibility for the defence of India is vested, must necessarily be free to act, according to his own judgement, where the peace or tranquillity of India, or any part of India, is threatened, even if he finds himself thereby compelled to dissent from the advice tendered to him by his Ministers within their own sphere.'[3] Dealing with the same matter in connexion with the Provinces, the Committee rejected the suggestion of the Joint Memorandum of the British Indian Delegation that this special responsibility should be restricted to cases in which the menace arose from subversive movements or activities tending to violence, and that the action taken in pursuance of this special responsibility should be confined to the Department of Law and Order. A menace, the Committee argued, might occur otherwise than through terrorism, subversive movements and crimes of violence. They did not find any logical reason for the distinction sought to be drawn. Ill-advised action in Departments other than the Department of Law and Order might give rise to menace. Therefore, the action could not be confined within one Department only, namely that of Law and Order.[4]

Both these criticisms are sound, so far as they go. For the troubles sought to be averted may arise from more causes than one, though in practice they are likely to arise out of subversive movements and crimes of violence. It is also true that an

[1] Either in the Federal or in the Provincial sphere.

[2] It will be noticed that the special responsibilities proposed in the White Paper were tightened in the Act as finally passed. It may also be seen that the items numbered (*a*), (*c*), (*d*), (*e*) and (*g*) have their exact counterpart in the Governors' special responsibilities in the Provinces.

[3] *Report*, par. 169.

[4] ibid., par. 79.

action in the department of land revenue, for instance, may lead to trouble and therefore justify intervention. On the other hand, it is clear that the clause is so wide that the Governor-General may justifiably interfere on numerous occasions. It should be noted, however, that there will not be, in practice, so much scope for its use in the Centre as in the Provinces, for the maintenance of law and order is a Provincial subject. And the Governor-General's intervention is more likely to take place in the Provincial than in the Federal sphere. Besides, it is not every action or proposed action of the Ministry that threatens peace or tranquillity which would give rise to this special responsibility. It must be a 'grave menace' to such peace and tranquillity. This special responsibility is imposed on the Governor-General because he is charged with the duty of preserving peace and tranquillity in India.

On the second special responsibility the Joint Committee[1] quoted with approval the view of the Federal Structure Sub-Committee that it was 'a fundamental condition of the success of the new Constitution that no room should be left for doubts as to the ability of India to maintain her financial stability and credit, both at home and abroad', and that it was necessary 'to reserve to the Governor-General in regard to budgetary arrangements and borrowing such essential powers as would enable him to intervene if methods were being pursued which would in his opinion seriously prejudice the credit of India in the money markets of the world'. A further, and no less cogent, reason, in the Committee's opinion, was the grave responsibility of the Governor-General in the matter of defence. The attempt of several Indian delegates to have the occasions of intervention specified was negatived on the ground that it was unwise to define this special responsibility. Under the very wide phraseology of the clause, the Governor-General will have power to intervene, if necessary, in matters other than budgetary arrangements and borrowings. The third Round Table Conference held that the Governor-General should not exercise the powers in question unless he was satisfied that failure to use them would seriously endanger

[1] *Report*, par. 170.

the financial stability and credit of the Federation. The Instrument of Instructions will direct the Governor-General that 'in the discharge of his special responsibility for safeguarding the financial stability and credit of the Federation [he] shall in particular make it his duty to see that a budgetary or borrowing policy is not pursued which would, in his judgement, seriously prejudice the credit of India in the money markets of the world, or affect the capacity of the Federation duly to discharge its financial obligations'.[1] The use of the words 'in particular' in this context implies that a very positive injunction is given to the Governor-General to look into budgetary and borrowing policies to prevent the result indicated, leaving him free to interfere in other matters as occasion demands. The direction, therefore, does not meet the very strong and insistent desire of the Indian delegates for a clearer definition of the occasions of intervention, a view which even the Joint Committee admitted as suitable for incorporation in the Instructions.[2] On the contrary, the direction to the Governor-General seems to indicate the reverse meaning.

Commenting on the third responsibility, the Joint Committee said :[3] 'The obvious intention is to secure some means by which minorities can be reasonably assured of fair treatment at the hands of majorities.' The expression 'legitimate interests' seemed to the Committee a very suitable and reasonable formula. Even so, it is undoubtedly a very vague and ambiguous expression. Besides, there may be honest difference of opinion as to the meaning of 'minorities'. The British Indian Delegation suggested that 'minorities' should be clearly defined so as to mean the racial and religious minorities, the sense in which the word was commonly understood. In rejecting this suggestion the Joint Committee said : 'No doubt it will be the five or six well recognized and more important minorities in whose interests the Governor's[4] powers will usually be invoked, but there are certainly other well-defined sections of the population who may from time to

[1] See Clause X, Appendix D. See also p. 16, *ante*.
[2] *Report*, par. 170.
[3] ibid., par. 79.
[4] This remark applies equally to the Governor-General.

time require protection, and we can see no justification for defining the expression for the purpose of excluding them.'[1] The expression was not intended to cover a political minority. In order to avoid any misunderstanding they suggested that the Instrument of Instructions should make that point plain. Further, this special responsibility was not intended to enable the Governor-General to stand in the way of social or economic reform merely because it was resisted by a group of persons who might claim to be regarded as a minority. The Instrument of Instructions will therefore direct the Governor-General to ' interpret his special responsibility for the safeguarding of the legitimate interests of minorities as requiring him to secure, in general, that those racial or religious communities for the members of which special representation is accorded in the Federal Legislature, and those classes who, whether on account of the smallness of their number or their lack of educational or material advantages or from any other cause, cannot as yet fully rely for their welfare on joint political action in the Federal Legislature, shall not suffer, or have reasonable cause to fear, neglect or oppression. But he shall not regard as entitled to his protection any body of persons by reason only that they share a view on a particular question which has not found favour with the majority '.[2]

As to the fourth special responsibility, the White Paper proposed that the Governor-General should have the special responsibility of securing to the members of the Public Services any rights provided for them by the Act and the safeguarding of their legitimate interests. The British Indian Delegation suggested that the expression ' legitimate interests ' should be clearly defined, and that the special responsibility should be restricted to the rights and privileges guaranteed by the Constitution. The Joint Committee[3] argued that the object of the White Paper was to guarantee to public servants not only their legal rights but also equitable treatment. That being so, precise legal definition was not possible. To the argument that it should not be assumed that Ministers would

1 *Report*, par. 79.
2 See Clause XI, Appendix D.
3 *Report*, par. 79.

act unreasonably their reply was that neither should it be assumed that the special responsibility would be exercised unreasonably. The Constitution provides a legal check on Ministers acting unreasonably, but where is any legal check (barring the check provided by the Secretary of State, which is unreal), on the unreasonable use of the Governor-General's powers? In fact it may happen that while the Governor-General safeguards the interests of some members of a service against improper action of Ministers, he himself may be doing injustice to certain other members of that service. That this is not a mere theoretical possibility will be borne out by the cases of more than one Indian member of the Indian Civil Service. For instance, a K. G. Gupta could not get a Lieutenant-Governorship nor an A. C. Chatterjee a Governorship, though apparently they were quite competent for those offices. Only recently a number of Provincial Governors were granted leave and temporary appointments in their places were made. None of these posts went to any Indian civilian. It is interesting to note that one of the vacancies went to Sir T. Stewart who was a junior Member of the Viceroy's Council, while Sir J. Prasad, a senior Member of the Council, was passed over. The relative merits of the two gentlemen is not the question here. What really strikes one is this: here was an Indian civilian who was found sufficiently competent to justify his promotion to the Viceroy's Council and apparently proved a success as a Member; still he did not get any of these temporary posts. Assuming that an equitable claim was overlooked, which might well be the case, there was no safeguard against that, even though the person concerned happened to be a public servant the protection of whose interests is, under the Act, one of the special responsibilities of the Governor-General.

The fifth and sixth responsibilities are designed to make the commercial and other safeguards effective in the executive sphere, that is, to prevent commercial and other forms of discrimination. Discrimination may be of two kinds:

(i) administrative and legislative discrimination against British commercial and other interests and British trade in India;

(ii) discrimination against British imports.

In order to realize the scope of the fifth responsibility it is necessary to comprehend the scope of Secs. 111 to 121 of the Act. Sec. 111 exempts a British subject domiciled in the United Kingdom from the operation of any Indian law which either imposes any restriction on the right of entry into British India or imposes by reference to place of birth, race, descent, language, domicile, etc., any disability or condition in regard to travel, residence, dealing in property, holding of public office or the carrying on of any occupation, trade, business or profession.

Sec. 112 prohibits any law imposing discriminatory taxation on British subjects domiciled in the United Kingdom or Burma or companies incorporated whether before or after the passing of the Act by or under the laws of the United Kingdom or Burma. A law is discriminatory and therefore barred if it results in subjecting any of the above-named persons or companies to greater taxation than that to which they would be liable if domiciled in or incorporated by the laws of British India.

Under Sec. 113, companies incorporated in the United Kingdom and the directors, shareholders, officers, etc., of such companies are to be deemed to comply with the requirements of any Indian law about (*a*) the place of incorporation of a company or the location of its registered office, or the currency in which its capital is expressed, or (*b*) the place of birth, race, descent, domicile, etc., of its directors, shareholders or servants. Any preference in respect of taxation given to companies for compliance with the conditions set forth above will be equally available to such British companies.

Sec. 114 extends the above privileges to persons of United Kingdom domicile in respect of companies incorporated under the laws of British India.

Sec. 115 specifically protects ships and aircraft registered in the United Kingdom from any Indian law which discriminates in favour of ships and aircraft registered in British India.

Sec. 116 makes companies incorporated in the United Kingdom eligible, notwithstanding any contrary provision of any Indian law, for any grant, bounty or subsidy payable out of the revenues of the Federation or of a Province for the

encouragement of any trade or industry to the same extent as companies incorporated by or under the laws of British India are eligible therefor.

It is, however, provided that an Act of the Federal Legislature or of a Provincial Legislature may require, in the case of a company which at the date of the passing of the Act was not engaged in British India in that branch of trade or industry which the Act seeks to encourage, that the company shall not be eligible for any grant, bounty or subsidy under the Act unless (*a*) it is incorporated by the laws of British India, or of a Federated State, and (*b*) not more than half of its directors are domiciled in British India, and (*c*) the company gives reasonable facilities for the training of persons domiciled in British India.

Under Sec. 119 no Bill or amendment which prescribes or empowers any authority to prescribe the professional or technical qualifications requisite for any purpose in British India or which imposes or empowers any authority to impose, by reference to any professional or technical qualification, any disability, liability, restriction or condition in regard to the practising of any profession, the carrying on of any occupation, trade or business or the holding of any office in British India, shall be introduced or moved in the Federal or Provincial Legislatures without the previous sanction in his discretion of the Governor-General or the Governor, as the case may be.

Secs. 120 and 121 safeguard British medical practitioners.

These restrictions on the legislative competence of the Indian Legislatures are evidently of a very wide and complex nature. In order to make them all-perfect the Governor-General has been given the special responsibility of preventing any administrative action on the part of Ministers which will be *ultra vires* in the legislative field : nay, it goes farther. The responsibility is to secure in the sphere of executive action the purposes which those provisions are designed to secure in the legislative sphere. The Governor-General by his Instructions is directed to construe this special responsibility as requiring him to differ from his Ministers if their advice would have effects of the kind which it is the purpose of those sections to prevent, ' even though the advice so tendered to him is not in

conflict with any specific provision of the said Act'.[1] He is to prevent executive action which is discriminatory in effect, though not in form.

The sixth special responsibility of the Governor-General is to prevent action which would subject goods of the United Kingdom or Burmese origin imported into India to discriminatory or penal treatment. The Fiscal Autonomy Convention, observed the Joint Committee,[2] would necessarily lapse with the passing of the new Act, and in the absence of any provision to the contrary, the Federal Legislature would enjoy complete fiscal freedom. Lest this fiscal freedom should be used to injure British trade, the Committee, under a verbiage of specious argument, suggested the addition of a new clause in the list of the Governor-General's special responsibilities, but not in that of legislative restrictions. This was intended to ensure the necessary flexibility,[3] while adequately safeguarding British interests. Incidentally, it may be noted that if the same method were followed in respect of the other matters just discussed, the Act would have been much less objectionable.

The Committee made it perfectly clear that they did not contemplate any interference with the position attained by India through the Fiscal Convention. In order to give 'full and clear guidance' to the Governor-General as to the scope of this responsibility, they suggested that appropriate provision should be made in the Instrument of Instructions. The directions of the Committee[4] are incorporated in the Instructions.[5] 'Our Governor-General shall avoid action which would affect the competence of his Government and of the Federal Legislature to develop their own fiscal and economic policy, or would restrict their freedom to negotiate trade agreements whether with the United Kingdom or with other countries for the securing of mutual tariff concessions; and he should intervene in tariff policy or in the negotiation of tariff agreements only if, in his opinion, the main intention of the policy contemplated is, by trade restrictions, to injure the

[1] See Clause XIII, Appendix D.
[2] *Report*, par. 343.
[3] ibid., par. 344.
[4] ibid., par. 345.
[5] Clause XIV.

interests of the United Kingdom rather than to further the economic interests of India.' Further, he is required to prevent 'both direct discrimination (whether by means of differential tariff rates or by means of differential restrictions of imports) and indirect discrimination by means of differential treatment of various types of products'. His special responsibility 'extends to preventing the imposition of prohibitory tariffs or restrictions, if he is satisfied that such measures are proposed with the aforesaid intention'. It also extends to measures which, though not discriminatory or penal in form, would be so in fact.

As regards (*g*), the words 'and the rights and dignity of the Rulers . . .' were added in course of the passage of the Bill through Parliament. On the meaning of the expression 'rights of the Indian States' the Joint Committee remarked :[1] 'The "rights" here referred to must necessarily mean rights enjoyed by a State in matters not covered by its Instrument of Accession, which may be prejudiced by administrative or legislative action in a neighbouring Province.' This referred to the Governor's special responsibility in the matter. On the responsibility of the Governor-General in this matter it was stated : 'This special responsibility only applies where there is a conflict between rights arising under the Constitution Act and those enjoyed by a State outside the Federal sphere.'[2] The third Round Table Conference observed : 'This is not intended to give the Governor-General any special powers *vis-a-vis* the States[3] in relation to matters arising in the Federal sphere proper ; the necessary powers having been transferred by the States in their Treaties, such matters will be regulated in accordance with the normal provisions of the Act.'[4] This had also nothing to do with the direct relations between the Crown and the States ; those matters would be outside the Constitution. 'It may be, however, that measures are proposed by the Federal Government, acting within its constitutional rights in regard to a Federal subject, or in relation to a "Central" subject not directly affecting the

[1] *Report*, par. 80.
[2] ibid., par. 171.
[3] This protection is extended to federating as well as non-federating States.
[4] *Report*, p. 29.

States at all, which, if pursued to a conclusion, would affect prejudicially rights of a State in relation to which that State had transferred no jurisdiction. Or again, policies might be proposed or events arise in a province which would tend to prejudice the rights of a neighbouring State.' Hence the Crown must have power ' to ensure that the particular course of action is so modified as to maintain the integrity of rights secured to the State by Treaty '.[1]

As to (*h*), the Joint Committee observed:[2] 'It is plain that the Governor-General must be free to exercise his own judgement in any matter which affects the administration of any of the reserved Departments, even though it arises primarily within the ministerial sphere.' The necessity for this special responsibility was thus explained by the White Paper:[3] ' It is apparent that if, for example, the Governor-General were to be free to follow his own judgement in relation to Defence policy only in regard to matters falling strictly within the ambit of the department of Defence, he might find that proposals made in another department in charge of a responsible Minister are in direct conflict with the line of policy he regards as essential for purposes connected with Defence, and consequently that the discharge of his responsibilities for Defence would be gravely impaired if he accepted the advice of the Minister.' Unless, however, such interference is restricted only to cases where the discharge of the Governor-General's responsibility for the Reserved Departments is ' gravely impaired', the scope of this responsibility becomes very extensive indeed. Moreover, it cannot be too often reiterated that, while the Act in this as in so many other matters provides a safeguard against a Minister misbehaving, there is no corresponding safeguard against a Governor-General misbehaving. Just as a Minister's action may prejudice the efficient conduct of a Reserved Department, so also the policy of a Reserved Department may greatly hamper the administration of Ministers' Departments. A vigorous Defence programme, for instance, may cripple all the Departments under

1 *Report*, p. 29. See also Appendix D, Clause XV.
2 ibid., par. 171.
3 Introduction, par. 27. See also *Joint Committee Report*, par. 175.

Ministers' control through the lack of adequate finance, or the pursuit of an unfriendly policy with a foreign country having considerable trade with India may gravely affect the efficient working of many of the Departments under responsible Ministers. Even granting that the Act does not presume wrong conduct on the part of Ministers and legislators in India, it still makes meticulous provision against such a contingency. One, however, looks in vain for any effective legal safeguard against misuse by the Governor-General and by his official superior, the Secretary of State, of their extraordinarily wide powers under the Act.

16

THE POWERS AND DUTIES OF THE GOVERNOR-GENERAL (*continued*)

In the previous chapter we have seen that certain Departments of the Federal Government will be directly under the control of the Governor-General, while the rest of the Federal Departments will be in charge of Ministers, subject to the Governor-General's power of intervention and control if any of his ' special responsibilities ' is involved. In addition to these large powers, the Act gives the Governor-General the power to act in his discretion or in the exercise of his individual judgement in respect of a number of specific matters in all fields of government. These will now be taken into consideration.

Appointments

Some of the key appointments are to be made by the Governor-General in his discretion. He makes all Defence appointments except those specifically reserved to itself by the Crown. Under an Order in Council[1] dated 18 December 1936, the following appointments are made by the Crown : General Officers Commanding-in-Chief, Commands, Chief of the General Staff, Adjutant-General, Quartermaster-General, Master-General of the Ordnance and Officers Commanding Districts.

The Governor-General, in his discretion, is to appoint Federal Ministers, Counsellors, the Financial Adviser, Chief Commissioners of minor Provinces, the officiating Chief Justices of the Federal Court and of the High Courts, acting Judges and additional Judges of High Courts, the Chairman and the members of the Federal Public Service Commission, the Auditor of Indian Home Accounts, six nominated Members of the Council of State, persons appointed to perform the

[1] Vide *Gazette of India*, 27 March 1937. Commissions in the Defence Forces are also granted by the Governor-General. See p. 37, *ante*.

duties of the President of the Council of State and of the Speaker of the Assembly, the Governor and the Deputy-Governors, permanent and officiating, of the Reserve Bank, three-sevenths of the members of the Federal Railway Authority, and the members of the Railway Tribunal. Similarly he will make all appointments in the Reserved Departments and in his own personal and secretarial staff.

In respect of the appointment of the Federal Advocate-General, the High Commissioner for India and the Directors of the Reserve Bank who are Government nominees, the Governor-General will act in the exercise of his individual judgement.

In respect of appointments made by the Crown the Secretary of State will certainly consult the Governor-General who will, in fact, have the initiative and decisive voice in most cases. In the appointment of Governors, unless chosen from British politicians, and of Federal Court Judges and the Auditor-General, his recommendation will practically prevail. In the appointment of the Advisers of the Secretary of State he will be consulted. As regards High Court Judges he will presumably go by the recommendation of the Governors.

It will thus be clear that, in law, the Ministry will have nothing to do with any appointments in any of the Reserved Departments, including Secretariat officers in those Departments. Similarly, such important appointments as those of the Financial Adviser, Governors and Deputy Governors of the Reserve Bank, three-sevenths of the Members of the Federal Railway Authority, officiating Chief Justice of the Federal Court and officiating Chief Justices and Puisne Judges and additional Judges of High Courts, the personnel of the Public Service Commission, heads of Minor Provinces and the entire Secretarial Staff of the Governor-General, the six nominations to the Council of State, are, in law, outside Ministerial control. The entire staff of the Political Department is, of course, beyond its purview.

Further, in respect of appointments vesting in the Crown the Ministers are not entitled to advise.

With regard to the appointments vesting in the Governor-General in his individual judgement the initiative and usually

the decisions will be those of the Ministers, but the Governor-General has the undoubted right of taking the final decision.

Appointments to all other Federal services and posts, unless otherwise expressly provided for in the Act, are to be made by the Governor-General on the advice of Ministers.[1] All selection-posts, other than those specified, will be made by the Ministry with the formal approval of the Governor-General.[2] For instance, the Secretariat officers, except in the Reserved and Political Departments, and heads of various Departments will be appointed by the Ministers. Even here the Governor-General may interfere if any of his special responsibilities is involved. Thus it is constitutionally within the rights of the Governor-General to disapprove the appointment of a given individual as, say, Secretary of a Department in the Secretariat, if in his judgement such appointment jeopardizes the legitimate interest of another member of the Service.[3]

Other Administrative Powers of the Governor-General in the Federal Sphere:

(1) The Governor-General will, in his discretion, summon and prorogue the Chambers, dissolve the Federal Assembly, address the Legislature or send messages to it.

(2) In certain cases he may, in his discretion, convene a joint sitting of the Chambers.

(3) The Governor-General is to make rules in the exercise of his individual judgement for the vacation of his seat in either Chamber by a Member who has been elected to both.[4]

(4) The Governor-General, in his discretion, may remove

[1] Sec. 241 (1).

[2] Sec. 246 (1) requires the Secretary of State to make rules specifying the posts in the non-Reserved Departments which are to be reserved to persons appointed by him. Appointments and postings to these 'reserved posts' are to be made by the Governor-General exercising his individual judgement. If, as is most probable, the posts of Secretaries, Deputy Secretaries and heads of attached offices are so reserved, then the final word in such appointments will, in law, lie with the Governor-General.

[3] Subject to any specific provision of the Act or of any statute to the contrary, the right of dismissal must be taken to be correlated to the right of appointment. The Public Service Commission and the Secretary of State have important powers in respect of appointment, dismissal, etc.

[4] Sec. 25 (1).

certain disqualifications on candidates for election to the Federal Legislature.[1]

(5) The Governor-General exercising his individual judgement may make rules safeguarding confidential matters from disclosure before Committees of the Legislature.[2]

(6) The Governor-General, in his discretion, shall, after consultation with the President or the Speaker of the Chamber, as the case may be, make rules

(*a*) for regulating the procedure of the Chamber in respect of matters in which he is required to exercise his individual judgement or to act in his discretion ;

(*b*) for securing the timely completion of financial business ;

(*c*) for prohibiting the discussion of, or the asking of questions on, any matter connected with any Indian State, other than a matter which is subject to Federal legislation, unless the Governor-General in his discretion is satisfied that it affects Federal interests or affects a British subject, and has given his consent to the matter being discussed or the question being asked ;

(*d*) for prohibiting, save with his consent, (i) the discussion of, or questions on, any matter concerning relations between the British Government or the Federal Government and any foreign State or Prince ; or (ii) the discussion of, or questions on, any action taken in his discretion by the Governor-General in relation to the affairs of a Province ; or (iii) the discussion of, or questions on, the personal conduct of the Ruler of a State or of a member of his family.[3]

(7) The Governor-General, in his discretion, may stop at any stage proceedings on any Bill or amendment if in his discretion he certifies that the discussion thereof would

[1] Sec. 26 (1), (*e*), (*f*). [2] Sec. 28 (4). [3] Sec. 38 (1).

affect the discharge of his special responsibility for the prevention of any grave menace to the peace or tranquillity of India or any part thereof.[1]

(8) The Governor-General is to use his discretion regarding the approval of the salaries and allowances of the Governor and Deputy Governors of the Reserve Bank, the supersession of its Central Board and any consequential action, and the liquidation of the Bank.[2]

(9) As to the Federal Railway Authority, the Governor-General in his discretion is to decide whether any question in dispute between the Federal Government and the Railway Authority is one of policy.[3] In his individual judgement the Governor-General will make rules regarding the conduct of business between the Authority and the Federal Government.[4] He may in his discretion issue any directions to the Authority in respect of any matter involving his special responsibilities or any other power exercisable in his discretion or individual judgement.[5]

(10) The Governor-General, in his discretion, may refer a question of law to the Federal Court for its opinion.[6]

(11) Rules of Court may be made by the Federal Court with the approval of the Governor-General in his discretion.[7]

(12) The Governor-General, in his discretion, may by regulations determine the number of members of the Federal Public Service Commission, and their tenure of office and conditions of service.[8] The Governor-General, in his discretion, may make regulations specifying the matters in respect of which the Commission need not be consulted with regard to Federal posts and services which are not recruited by the Secretary of State.[9]

The Governor-General and Finance

All expenditures required by the Governor-General for discharging his functions with respect to defence and ecclesiastical

1 Sec. 40 (2). 2 Sec. 152 (1). 3 Sec. 183 (2).
4 Sec. 184 (1). 5 Sec. 183 (4). 6 Sec. 213.
7 Sec. 214. 8 Sec. 265 (2). 9 Sec. 266 (3).

affairs, his functions with respect to external affairs, tribal areas, and the administration of any territory which he controls in his discretion, and certain other heads of expenditure, are charged on the revenues of the Federation ;[1] that is, these are non-votable by the Legislature and in respect of any such expenditure the Governor-General's decision must prevail. The annual estimates of expenditure must show the sums, if any, which are included solely because the Governor-General has directed the inclusion thereof as necessary for the discharge of any of his special responsibilities.[2] Any demand which is rejected or reduced by the Legislature may be restored by the Governor-General, either in full or in part, if in his opinion such rejection or reduction affects the discharge of any of his special responsibilities.[3]

The Governor-General and Federal Legislation

A. Negative power of legislation :

(1) The Governor-General, in his discretion, may assent in the King's name to a Bill passed by the Legislature, withhold his assent from it or reserve it for His Majesty, or send it back to the Chambers for reconsideration.[4]

(2) The previous sanction of the Governor-General, in his discretion, is required for the introduction in either Chamber of the Federal Legislature of any Bill or amendment which

(*a*) repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India which the Indian Legislature is competent to repeal or amend, or

(*b*) repeals, amends or is repugnant to any Governor-General's or Governor's Act, or any ordinance promulgated in his discretion by the Governor-General or a Governor ; or

(*c*) affects matters in which the Governor-General is required by or under the Act to act in his discretion ; or

[1] Sec. 33 (3).
[2] Sec. 33 (2).
[3] Sec. 35 (1).
[4] Sec. 32 (1).

(*d*) repeals, amends or affects any Act relating to any police force ; or

(*e*) affects the procedure for criminal proceedings in which European British subjects are concerned ; or

(*f*) subjects persons not resident in British India to greater taxation than persons resident in British India or subjects companies not wholly controlled and managed in British India to greater taxation than companies wholly controlled and managed therein ; or

(*g*) affects the grant of relief from any Federal tax on income in respect of income taxed or taxable in the United Kingdom.[1]

Over and above this long list of important subjects, the previous sanction of the Governor-General in his discretion is required in respect of Bills or amendments relating to a number of other specific matters ; these are :—

(i) any measure affecting coinage or currency or the constitution or functions of the Reserve Bank ;[2]

(ii) any measure amending any Order in Council respecting the functions of the Auditor-General of India or of the Auditor of Indian Home Accounts ;[3]

(iii) any measure amending the provisions of the 8th schedule which supplements the provisions of the Act regarding the Federal Railway Authority ;[4]

(iv) any Bill enlarging the appellate jurisdiction of the Federal Court ;[5]

(v) any Bill giving a High Court original jurisdiction in revenue matters ;[6]

(vi) any Bill to extend the functions of the Federal Public Service Commission so far as it is within the competence of the Federal Legislature to do so ;[7]

[1] Sec. 108 (1).
[2] Sec. 153.
[3] Secs. 166 (3), 170 (3).
[4] Sec. 182.
[5] Sec. 206 (3).
[6] Sec. 226.
[7] Sec. 267.

(vii) any measure providing for the transference to public ownership of any land or for the abrogation or modification of rights therein.[1]

The Governor-General in his discretion may suspend the operation of sub-section (1) of Sec. 111 in so far as the enactment of legislation prohibiting the entry into British India of British subjects domiciled in the United Kingdom is barred. In this case he has to certify that the action is necessary for the prevention of a grave menace to the peace or tranquillity of some part of India or for the purpose of combating crimes of violence intended to overthrow the Government.[2]

B. Positive power of legislation :

The Governor-General has power of legislation by ordinance and by Act. The former is of two kinds :

(*a*) Ordinances promulgated on the advice of the Council of Ministers at a time when the Legislature is not in session and immediate action is necessary. If the subject-matter of the ordinance is one on which the introduction of a Bill requires previous sanction of the Governor-General in his discretion, then in promulgating it the Governor-General has to exercise his individual judgement. Such an ordinance will expire after six weeks from the reassembly of the Legislature unless earlier revoked by resolutions of both Chambers, or by the Governor-General, on advice, as the case may be.[3]

(*b*) Ordinances promulgated by the Governor-General in his discretion. If at any time the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action for enabling him satisfactorily to discharge his functions in respect of which he is required to act in his discretion or in the exercise of his individual judgement, he may promulgate an ordinance. Such an ordinance may not continue in operation for more than six months unless extended by a subsequent ordinance for a further period not exceeding six months.[4]

Apart from this power of temporary legislation, the Governor-General in his discretion is empowered to enact

[1] Sec. 299 (3).
[2] Sec. 111 (3).
[3] Sec. 42.
[4] Sec. 43.

permanent laws to be known as Governor-General's Acts. If it appears to the Governor-General that for the satisfactory discharge of his functions in his discretion or individual judgement it is essential that provision should be made by legislation, he may by message to the Legislature explain the circumstances which render legislation essential, and either :—

(i) enact forthwith, as a Governor-General's Act, a Bill[1] containing such provisions as he considers necessary ; or

(ii) attach to his message a draft of the Bill which he considers necessary.

If the latter course is adopted, the Governor-General may, after one month has expired, enact the Bill as a Governor-General's Act, either in the form of the draft proposed to the Chambers or with such amendments as he deems necessary, after taking into consideration the suggestions of either Chamber by message, if any, in regard to the Bill.[2]

It will be seen that, as compared with the old Act the Governor-General's power of legislation either by ordinance or by Act is more sweeping under the new Act, although its area is narrower, for the power is exercisable only in the field of his functions in his discretion or in his individual judgement.

The Governor-General and Breakdown of the Constitution.

If the Governor-General, in his discretion, is at any time satisfied that a situation has arisen in which the government of the Federation cannot be carried on according to the provisions of the Act, he may by Proclamation declare that the functions of the Federal Government to the extent specified in the Proclamation shall be exercised by him in his discretion, and may assume to himself all or any of the powers vested in or exercisable by any Federal body or authority, except the Federal Court.[3] This Proclamation is to expire after six months, but may be renewed for a year at a time up to a period of three years by resolutions of both Houses of Parliament.

[1] A Governor-General's Act may thus be enacted without the Legislature being consulted.

[2] Sec. 44.

[3] Sec. 45. Under this break-down clause the Governor-General may assume full dictatorial powers to carry on the Government of the Federation.

The Governor-General vis-à-vis the Units of the Federation.

The Governor-General has, in law, large powers of control over the Provincial Governments :

(1) The Governor of a Province, in the exercise of his powers in his discretion or in his individual judgement, is under the superintendence and direction of the Governor-General in his discretion.[1] Hence, constitutionally speaking, the whole range of the activities of a Governor outside the sphere of Ministerial authority, is potentially a field for the intervention of the Governor-General.[2] This field is by no means small or unimportant.

(2) The Governor of a Province has the right of promulgating ordinances and enacting Acts in the circumstances in which the Governor-General can, *mutatis mutandis*, exercise these powers. But he cannot, without the instructions of the Governor-General in his discretion, promulgate an ordinance in the Ministerial sphere if a Bill containing the same provisions would have required the previous sanction of the Governor-General for its introduction, or if he would have thought it necessary to reserve a Bill having the same provisions for the consideration of the Governor-General.[3]

The promulgation of ordinances by the Governor in his discretion, that is, in respect of matters where he is required to exercise his discretion or individual judgement, requires the concurrence of the Governor-General in his discretion. If the Governor thinks it impracticable to obtain in time such concurrence he may dispense with it, but in that case the Governor-General may in his discretion direct the Governor

[1] Sec. 54.

[2] cf. "The changed conditions of government in India have resulted in even closer and more personal relationships between the Viceroy and the Governors of Provinces than might formerly have been required ; many spheres of activity which the Central Government so long could control and co-ordinate have passed now into the hands of autonomous governments in the provinces ; in some of these spheres of activity the Viceroy alone remains as the constitutional link between the provinces and the centre. . . The burden thrown personally on the Viceroy has been a heavy one.' Lord Brabourne at the St. Andrew's Dinner. See *The Statesman* (Calcutta), 1 December 1937. Formerly the correspondence between the Governor-General and the Governors was irregular. Since the introduction of Provincial Autonomy regular fortnightly correspondence has been introduced.

[3] Sec. 88.

to withdraw the ordinance and it has to be withdrawn accordingly.[1]

Moreover, the enactment of a Governor's Act requires the concurrence of the Governor-General in his discretion.[2]

(3) The Governor of a Province may reserve a Bill for the consideration of the Governor-General who may either assent to it in the King's name, or withhold his assent from it, or reserve it for the consideration of the King, or return it to the Governor for reconsideration by the Provincial Legislature.[3] Under his Instrument of Instructions the Governor is bound to reserve four classes of Bills ; in other cases, however, reservation is optional. It may be noted that the Governor-General himself is required by the Instructions proposed to be issued to him to reserve all these compulsorily reserved Provincial Bills for the signification of the King's pleasure.[4]

(4) The Governor-General's previous sanction in his discretion is required in respect of a Bill or amendment to be introduced or moved in a Chamber of a Provincial Legislature if it

(*a*) repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India ; or

(*b*) repeals, amends or is repugnant to any Governor-General's Act, or any ordinance promulgated in his discretion by the Governor-General ; or

(*c*) affects any matter in respect of which the Governor-General is required to act in his discretion ; or

(*d*) affects the procedure for criminal proceedings in which European British subjects are concerned.[5]

In addition to general administrative control by the Governor-General over the actions of a Governor in his discretion or in his individual judgement, and the legislative control just stated, the Governor-General has certain specific powers of control over the Provinces and the Federated States :

(1) The Governor-General may in his discretion direct the

1 Sec. 89. Even otherwise the Governor-General can give this direction.
2 Sec. 90.
3 Secs. 75, 76.
4 Clause XXVII. Vide Appendix D.
5 Sec. 108 (2).

Governor of a Province to act as his agent in respect of tribal areas, or in relation to defence, external affairs, or ecclesiastical affairs, to the extent specified in his direction.[1]

(2) If an agreement is made between the Federal Government and the Ruler of a Federated State for the administration by him or by the officers in his State of any Federal law applicable therein, the Governor-General in his discretion has power to satisfy himself, by inspection or otherwise, that the agency is properly discharged. If he is not so satisfied, the Governor-General, acting in his discretion, may issue such directions to the Ruler as he thinks fit.[2]

(3) The Governor-General in his discretion has power to issue orders to the Governor of a Province where the Provincial Government impedes the executive authority of the Federation or fails to comply with the directions of the Federal Government as to the carrying into execution of a Federal Act on a subject falling under Part II of the Concurrent List if a Federal Act has authorized the giving of such directions.[3]

(4) The Governor-General, in his discretion, may direct the Governor of a Province as to the manner in which the executive authority of the Province is to be exercised for preventing any grave menace to the peace or tranquillity of India or any part thereof.[4]

(5) If the Ruler of a Federated State impedes the exercise of Federal executive authority in his State, the Governor-General in his discretion may issue such directions to the Ruler as he thinks fit.[5]

Lastly, the Governor-General has certain powers as mediator or umpire between the Federation and its Units :

(1) If the Governor-General in his discretion declares by Proclamation that a grave emergency exists whereby the security of India is threatened, the Federal Legislature will

[1] Sec. 123. [2] Sec. 125. [3] Sec. 126.

[4] Sec. 126 (5). It was under this Section that Lord Linlithgow issued instructions to the Governors of Bihar and the United Provinces not to agree to the proposal for release of political prisoners. See his telegram of 15 February 1938. Cmd. 5674.

[5] Sec. 128.

have power to make laws for a Province in respect of any matter enumerated in the Provincial Legislative List. The previous sanction of the Governor-General in his discretion is necessary for the introduction of such a measure.[1]

(2) The Governor-General, acting in his discretion, may by public notification empower either the Federal Legislature or a Provincial Legislature to legislate on a residuary subject. The executive authority of the Federation or of the Province, as the case may be, extends to the administration of any law so made, unless the Governor-General in his discretion otherwise directs.[2]

(3) Normally where both the Federal Legislature and a Provincial Legislature legislate on a subject in the Concurrent List, the Federal law, in case of conflict between the two, will prevail to the extent of repugnancy. But where a Provincial law in the concurrent jurisdiction, which is repugnant to an existing Indian or Federal law, is reserved for the consideration of the Governor-General or the King, it will be valid in the Province if assent to it is given by the Governor-General or by the King, as the case may be. The Federal Legislature may, however, subsequently legislate on the same matter. But no measure, which is repugnant to a Provincial law so reserved and assented to, may be introduced into the Federal Legislature without the previous sanction of the Governor-General in his discretion.[3]

(4) The previous sanction of the Governor-General in his discretion is required to the introduction into the Federal Legislature of a measure which proposes to authorize the Federal Government to give directions to a Province as to the carrying into execution therein of a Federal Act on a subject included in Part II of the Concurrent List.[4]

(5) No Bill or amendment which imposes or varies any tax or duty in which Provinces are interested, or which varies the meaning of the expression "agricultural income" as defined for the purposes of Indian income tax law or which affects the principles on which moneys are or may be

[1] Sec. 102.
[2] Sec. 104.
[3] Sec. 107.
[4] Sec. 126 (2).

distributable to Provinces or States under the Act, or which imposes any Federal surcharge on certain taxes or duties,[1] can be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.[2]

(6) A Province may not without the consent of the Federation borrow outside India, nor without the like consent raise any loan, if there is still outstanding any part of a loan to the Province made or guaranteed by the Federation or by its predecessor, the Governor-General in Council. The Federation cannot withhold such consent unreasonably nor can it refuse, if sufficient cause is shown, to make a loan to, or to give a guarantee in respect of a loan raised by, a Province or impose any unreasonable condition in respect of any of the aforesaid matters. In case of a dispute on any of these matters reference must be made to the Governor-General whose decision in his discretion shall be final.[3]

(7) The Governor-General, in his discretion, shall determine any question that may arise between the Federal Railway Authority and a Province or State as to the amount payable by the former to the latter in respect of the expenses incurred by the latter for policing Federal railway premises.[4]

(8) The Governor-General, in his discretion, shall make rules requiring the Federal Railway Authority and any Federated State to give notice of any proposal for constructing a railway or for altering the alignment or gauge of a railway. The rules are to provide for the lodging of objections by the Authority or by a Federated State on the ground that the carrying out of the proposal will result in unfair or uneconomic competition with a Federal Railway or a State Railway, as the case may be. If an objection so lodged is not withdrawn the Governor-General has to refer the matter to the Railway Tribunal.[5]

(9) The Federal Government may not unreasonably

[1] On income tax, or on certain succession duties, stamp-duties, terminal taxes and taxes on fares and freights.

[2] Sec. 141. [3] Sec. 163.

[4] Sec. 187 (3). [5] Sec. 195.

refuse to entrust to the Government of any Province or the Ruler of a Federated State such functions with respect to broadcasting as may be necessary to enable that Government or Ruler

(*a*) to construct and use transmitters in the Province or State;

(*b*) to regulate, and impose fees in respect of, the construction and use of transmitters and the use of receiving apparatus in the Province or State. The Federal Government may impose conditions but not so as to regulate the matter broadcast by, or by authority of, the Government or Ruler. If any question arises as to whether any condition imposed by the Federal Government is lawful, or as to whether any refusal by it to entrust functions is unreasonable, the question will be decided by the Governor-General in his discretion.[1]

(10) In case of a complaint by a Province or a Federated State regarding any interference with its water supply due to the action of any Province or State, the Governor-General may, in his discretion, decide the matter on the report of a Commission appointed by him to enquire into it.[2]

The Viceroy and the Indian States

Passing to the second capacity of the Viceroy, that is, his function as Representative of the Crown in relation to the Indian States, we find that until 1 April 1937 the rights and duties incidental to Paramountcy were uniformly exercised by the Governor-General in Council, originally on behalf of the East India Company, and after 1858 on behalf of the Crown. The Act of 1935, however, breaks this continuity. It declares that any powers connected with the exercise of the functions of the Crown in its relations with Indian States shall in India, if not exercised by His Majesty, be exercised only by, or by persons acting under the authority of, His Majesty's Representative for the exercise of those functions.[3] In pursuance of this provision the Crown Representative has been empowered by the Letters Patent constituting his office

[1] Sec. 129. [2] Sec. 131. [3] Sec. 2 (1).

to exercise in India on behalf of the King all powers and jurisdiction which have hitherto been exercisable in relation to Indian States by the Governor-General or the Governor-General in Council, except so much of those powers and that jurisdiction as may be specifically withheld by the King.[1] It will be found that the Crown Representative has all powers of the Crown except any definitely retained, while in the case of the Governor-General the Crown retains all its prerogatives except those which are specifically delegated.[2] The extent of the powers of the Crown Representative in relation to the States is the sum total of all rights and duties denoted by the term ' Paramountcy ', less such of them as will be transferred to the Governor-General or any other Federal Authority by the Rulers' Instruments of Accession. This deduction is made in respect of Federating States ; but as regards other States, the whole range of Paramountcy vests in the Crown Representative. In this capacity the Viceroy has and will have immense power and influence. This is a sphere which, in law, is wholly outside the influence or authority of the Ministers. The exclusive possession of the powers of Paramountcy may in the future give the Viceroy considerable strategic advantage as against both the Federal Ministry and the Indian States.[3]

[1] Letters Patent, Clause 3. Vide Appendix B.

[2] Vide Appendix A.

[3] The grant of responsible government at the Centre is the only ostensible reason for the creation of a separate Crown Representative in respect of relations with the Indian States. Nobody knows when Federal responsibility will come into existence. Yet the Crown Representative began to function simultaneously with the inauguration of Provincial Autonomy with effect from 1 April 1937. It is, however, difficult to find any connexion between the two.

17

THE POSITION OF THE GOVERNOR-GENERAL IN THE FEDERAL EXECUTIVE

Under the dyarchical form of government established in the Provinces by the Act of 1919 the Reserved subjects were administered by the Governor in Council and the Transferred subjects by the Governor acting with Ministers. In the Federal dyarchy, however, the Reserved subjects are to be administered by the Governor-General himself in his discretion and the other subjects by a Council of Ministers. The Reserved Departments will not be administered by the Governor-General and his Counsellors, but by the Governor-General with, if he so desires, the assistance of Counsellors. In the administration of the other Departments the Governor-General does not come in, except as a constitutional head, unless any of his special responsibilities is involved.

The Council of Ministers must not exceed ten in number.[1] This does not preclude the appointment of more Ministers, either by that name or as Parliamentary Secretaries. But legal and constitutional responsibilities are fixed upon the Council of Ministers ; and none but a Member of this Council is eligible to be the political head of any of the Departments of the Federal Government under Ministerial control, or has the right of advising the Governor-General in respect thereof.

The Ministers are to be chosen and summoned by the Governor-General and will hold office during his pleasure.[2] A Minister cannot hold office unless he is a Member of the Federal Legislature or becomes a Member thereof within six months of his appointment.[3] Subject to this restriction, the Governor-General is to act in his discretion in the appointment or dismissal of Ministers.[4] In conformity with the usual practice regarding the Dominions, the Act makes no

[1] Sec. 9 (1).
[2] Sec. 10 (1).
[3] Sec. 10 (2).
[4] Sec. 10 (5).

mention of responsible government. Theoretically, the Ministers are servants of the Crown appointed by, and responsible to, the Governor-General; and, in law, their function is merely 'to aid and advise' the Governor-General in the administration of the non-Reserved Departments. The principle of responsible government is, however, to be found in the Instrument of Instructions which will guide the Governor-General in regard to the manner of choosing his Ministers and in respect of his relation to them. Thus on the first point the Instructions are as follows:

'In making appointments to his Council of Ministers Our Governor-General shall use his best endeavours to select his Ministers in the following manner, that is to say, in consultation with the person who, in his judgement, is most likely to command a stable majority in the Legislature, to appoint those persons (including so far as practicable representatives of the Federated States and members of important minority communities) who will be best in a position collectively to command the confidence of the Legislature. But, in so acting, he shall bear constantly in mind the need for fostering a sense of joint responsibility among his Ministers.'[1] This clause embodies the essential principles of Cabinet Government—(1) the choice of Ministers in consultation with the person likely to have a stable majority; (2) appointment as Ministers of persons commanding the confidence of the Legislature, and (3) collective responsibility.

The directions on all these points are, of course, elastic. They have been deliberately so worded, and in the nature of the case they cannot be very precise or absolutely mandatory. The wording of the clause seems to indicate that in the choice of Ministers the initiative lies with the Governor-General, and the person who is likely to command a stable majority in the Legislature will play second fiddle to him. In practice it will be totally different, as the example of the Provinces clearly indicates. After the elections to the Provincial Legislative Assemblies were over, the Governor in each Province entrusted a certain individual with the task of forming a Ministry. Although the term 'Prime Minister' is eschewed

[1] Clause VIII. See Appendix D.

from the Act and the Instrument of Instructions, in every Province the head of the Ministry is designated, officially and unofficially, as Prime Minister.[1] In no Province does any Governor appear to have influenced the choice of individual Ministers, either by suggesting or opposing any particular name. In the Provinces where Congress has an absolute majority, the Governors' part consisted merely in approving the lists formally submitted to them by the leaders of the Congress Party in the respective Assemblies. Even in a Province like Bengal where there is a coalition, the Governor does not seem to have interfered in respect of personnel. As to the inclusion of members of minority communities, no Governor has interpreted his duty in the sense of requiring the inclusion of any given person, either because that person appeared to him to be most suitable or because that person was supposed to be a more representative member of the minority concerned than another.

In the Federation the practice must be the same. If there is any individual with a clear majority in the Federal Legislature, he must be called upon to form the Ministry.[2] His designation will naturally be 'Prime Minister of the Federation'. He will choose his own colleagues. Undoubtedly he will include in his Ministry representatives of the Indian States and members belonging to important minorities in order to ensure the stability of his Ministry and also to assure the interests concerned of fair play. Who these persons are will presumably depend upon the Prime Minister. If the Governor-General's duty is to try and secure the representation of these interests in the Ministry, he has the equal, perhaps greater, duty of developing a spirit of joint responsibility among the Ministers. Hence he may not insist on the inclusion of some person or interest, irrespective of this last consideration. If, for instance, there is an important minority in the Legislature whose policy and outlook are clearly opposed to those of the Prime Minister, and the Prime Minister is unable to find anybody within that group prepared

[1] In Bengal and Assam the official term appears to be 'Chief Minister'.

[2] Failing such a person, the invitation must be sent to the leader of the largest Party.

to share the general outlook of his Party, the Governor-General is not required to insist that the Prime Minister must take in his Ministry somebody representing that minority, nor should he in propriety do so. The same principle will apply to the representation of the States. Where, however, there is a coalition the matter is different, for there the representation of the coalescing groups in the Ministry is determined by mutual bargain. The composition of the Federal Assembly has been deliberately so planned that no Party is likely to have a stable majority. Coalitions in the Federal Government appear, therefore, to be almost inevitable.

The actual strength of the Council of Ministers, within the statutory limit of ten, will primarily depend upon the Prime Minister with the almost inevitable approval of the Governor-General, subject to the subsequent acquiescence of the Legislature through its power of fixing Ministers' salaries. Given the different interests which the Prime Minister will find it expedient to include in his Government, it is more likely than not that the actual number will be the maximum permissible, or very near it.

The Act requires[1] the Governor-General to make rules for the allocation among Ministers of the business of Government within the Ministerial sphere. This presumably refers to the division of the business of Government into Departments. These rules are to be made after consultation with Ministers, that is, in practice according to their suggestion. Even so, there can be no doubt that the distribution of Federal portfolios will be regarded as within the discretion of the Prime Minister, subject to the formal approval of the Governor-General.

The influence of the Governor-General on the choice of the personnel of the Ministry and other connected matters will in practice depend upon the personality and political position of the Prime Minister.

The Federal Council of Ministers is likely to be a composite body, representing British India and the Indian States. The British Indian Ministers will be elected Members of the Legislature : the State representatives in the Ministry are

[1] Sec. 17 (3).

likely to be nominees of the Rulers of some States. The successful working of the Cabinet system postulates a united Cabinet sharing responsibilities in common and answering collectively to the Legislature. The absence of the State-element makes the problem simpler in the Provinces ; but even there complication arises out of separate communal electorates. In the Congress Provinces the Prime Ministers have taken in their Cabinets persons belonging to the minorities not as representatives of minorities as such but as persons who, previous to their appointment, signified their adherence to the Congress. So Congress Cabinets may fairly be regarded as politically homogeneous. In the Federal Government homogeneity will be very difficult of achievement, firstly, because it is extremely doubtful if a single Party will command the majority, or even a substantial number, of the seats in the Legislature, and consequently, a Ministry will consist of heterogeneous elements; and secondly, because the State representatives are likely to be nominated by the Rulers of the States.

In theory, however, the State member or members of the Federal Executive will have no double allegiance—their responsibility will be, like that of the British Indian Ministers, to the Federal Legislature, and inside the Cabinet to the Prime Minister. They will not be officers serving in any State nor will the States from which they come have any right of instructing them. 'The representatives of the States,' said the Nawab of Bhopal, 'if they are appointed to the Executive, will have no connexion whatsoever with the States themselves. They will have their policy according to their own views, and have nothing to do with the policy of a State or a group of States."[1] Yet the fact that a person comes to the Legislature and through it to the Ministry by the favour of the Ruler of a State may make him amenable to the wishes of that Ruler. He cannot feel the same independence as he would if he did not owe his membership of the Legislature to the favour of the Ruler.

The responsibility of the Ministers will be collective.

[1] Speech at the Federal Structure Committee of the 2nd Round Table Conference on 28 October 1931. See Report of the Committee, p. 315. Also see Col. Sir Kailas Haksar's speech on 15 September 1931, ibid., p. 76.

But collective responsibility, implying as it does the taking of responsibility by the Ministers for one another's actions, makes it necessary that the Ministers should also share collectively in the making of decisions. That is why in a Cabinet system important decisions are made collectively. In the Federal Ministry the same principle will hold good. But one result of this is that the Ministers belonging to the States will participate in the making of decisions not only on Federal matters but also on purely British Indian matters. This will be unfair to British India seeing that the Federal Ministers cannot interfere in State affairs. This point was met by the Nawab of Bhopal with these words : 'By accepting the principle of collective responsibility, the representatives of the States who may be on the Federal Executive do not desire, as far as they are concerned, to be placed in the position of having to participate in the decision of purely British Indian Central subjects."[1] This matter will obviously be left to convention.

The Council of Ministers will be constitutionally responsible to the Federal Legislature. This will be regulated by convention rather than by positive law. The Instrument of Instructions, while directing the Governor-General to try and appoint as Ministers persons who are best in a position collectively to command the confidence of the Legislature, does not say what should be his attitude towards a Ministry in office which has forfeited the confidence of the Legislature. As normal constitutional practice will apply, it will be unconstitutional for the Ministry to retain office in such circumstances, and equally unconstitutional for the Governor-General to continue to have them as his advisers, unless he dissolves the Federal Assembly soon after, in order to secure the verdict of the electorate. In a case like this, it is the right and duty of the Governor-General to dismiss the Ministers if they should refuse to go out voluntarily.

But the question is : to whom is the Ministry responsible —to the Federal Legislature or the Federal Assembly only ? The Act and the Instrument of Instructions offer no guidance on this point, though the latter speaks of 'the confidence of

[1] Speech at the Federal Structure Committee of the 2nd Round Table Conference on 28 October 1931. See Report of the Committee, p. 314.

the Legislature' which would appear to indicate both the Chambers. More than once in the discussions preceding the enactment of the Act of 1935 Sir Tej Sapru suggested that the Ministers' responsibility should be to the two Chambers jointly. His main object was to ensure stability, and for that purpose he even seriously suggested that a direct vote of censure should require a majority of about two-thirds or three-fourths of the Federal Legislature at a joint session.[1] The idea of responsibility to both Houses naturally appealed to the States' delegates, because it would have given the States still further control over the Federal Government, inasmuch as they were given heavier weightage in the Council of State than in the Assembly. In his zeal for stability Sir Tej minimized the obvious drawbacks of his suggestion. Lord Reading, who supported Sir Tej Bahadur's suggestion, rightly pointed out, however, that under this scheme there might not be the requisite majority to turn out a Ministry but that Ministry would yet be unable to have its legislative proposals enacted, if the majority in the Legislature were hostile.[2] The result would be stability, but at the cost of weakness and ineffectiveness in the Government. Given the composition of the Legislature, such a requirement might unquestionably lead to weak and unpopular Ministries clinging to office, a sure way of discrediting Parliamentary government. Fortunately, there is no such provision in the Constitution and a bare majority is enough for a vote of censure. Apart from a formal vote of censure, the rejection of an important measure or the like may of course be treated by the Ministry as want of confidence.

The responsibility of the Ministry must be understood as implying responsibility to the Lower House. A Cabinet cannot be responsible to both Chambers at the same time. In every constitution which provides for the Cabinet form of government, except perhaps that of France, the responsibility of Ministers is, by convention, understood as responsibility to one of the Chambers, that is, in practice to the Lower House.

[1] See *Proceedings of the Federal Structure Committee of the 1st Round Table Conference*, 2 January 1931, p. 147.

[2] See *Proceedings of the Federal Structure Committee*, 5 January 1931, p. 164.

There is no reason why in India in similar circumstances political responsibility should not be to the Federal Assembly alone.[1]

Responsible Government has two essential characteristics which are really complementary to each other : firstly, in its relation to the Legislature, the Ministry is accountable to the Legislature and ceases to hold office if it is unable to carry the majority of the legislators with itself. This objective is secured in India by the means stated above. Secondly, so far as the relation of the Ministry with the executive head is concerned, the latter is guided by the advice of the Ministry so long as it retains the confidence of the Legislature. In the absence of this condition, the responsibility of the Ministry to, and its harmony with, the Legislature cannot be secured ; for Ministers, like all else, cannot serve two masters at the same time.

This second condition is not secured by the Act which assigns to the Ministry the function merely ' to aid and advise '. It is, however, secured by clause IX of the proposed Instrument of Instructions which prescribes the constitutional relationship between the Governor-General and his Ministers and is, therefore, the master-key to the Constitution. ' In all matters within the scope of the executive authority of the Federation, save in respect of those functions which he is required by the said Act to exercise in his discretion, Our Governor-General shall in the exercise of the powers conferred upon him be guided by the advice of his Ministers, unless in his opinion so to be guided would be inconsistent with the fulfilment of any of the special responsibilities which are by the said Act committed to him, or with the proper discharge of any of the functions which he is otherwise by the said Act required to exercise on his individual judgement ; in any of which cases[2] Our Governor-General shall, notwithstanding his Ministers' advice, act in the exercise of the powers conferred upon him in such manner as to his individual judgement

[1] cf. Professor Keith, who observes : ' Presumably it is accepted that the lower house must determine the tenure of office of the Ministry.' *A Constitutional History of India*, p. 334.

[2] This refers to cases involving special responsibilities and functions in individual judgement—and not to powers exercisable in his discretion.

seems requisite for the due discharge of the responsibilities and functions aforesaid'.[1] This clause thus directs how the powers of the Governor-General are to be exercised. The Governor-General under the Act may act (1) in his discretion, or (2) on advice, or (3) in the exercise of his individual judgement. The distinction between 'discretion' and 'individual judgement' is important. Explaining the difference, Sir Donald Somervell, then Solicitor-General, observed: 'The words "individual judgement" are used in relation to actions by the Governor-General on his individual judgement in the ordinary sense of the word within the ambit in which normally he would be acting on the advice of his Ministers. If within that ambit it is sought to give the Governor-General special powers or responsibilities, then the words "individual judgement" are used.[2] The words "in his discretion" are used where the Governor-General will be acting on his own judgement but in an area outside that field.'[3] The real clue to the distinction, he stated, was not in consultation or non-consultation with Ministers: the words 'individual judgement' were used in respect of powers within the area in which normally the Governor-General would be acting on the advice of his Ministers, and the words 'in his discretion' were used in respect of powers and functions outside that area.[4] On a subsequent occasion the Solicitor-General further elucidated the meaning of 'individual judgement'. He said:

'The words "individual judgement" are used when the question which is being dealt with is within the field of Federal responsibility[5], and is therefore by its nature a matter with which Ministers deal, and with which they are responsible for dealing. The idea is that these are matters for which the primary responsibility falls on the Ministers, and the insertion of the phrase "individual judgement" merely means that in the last resort, if the Governor-General disagrees with the Ministers he can overrule them.'[6]

[1] Clause IX. See Appendix D.

[2] e.g. in Sec. 12.

[3] e.g. Sec. 11. This, he explained, was a matter of drafting. See *House of Commons Debates* (Fifth Series), vol. 298, 1934-5, 28 February 1935, col. 1335-6.

[4] ibid., col. 1336.

[5] This rather loose expression was intended to imply Ministers' responsibility.

[6] *H.C.D.*, 14 May 1935, vol. 301, col. 1613.

Sir Donald Somervell's distinction between the two expressions in terms of the subject-matter being inside or outside the normal ambit of Ministerial responsibility cannot be said to have been uniformly followed in drafting the Act. His distinction is clearly applicable in respect of the Reserved Departments and the special responsibilities. On the other hand, in the appointment of the Directors of the Reserve Bank the Governor-General is to act in his individual judgement, while he is to appoint the Governor and the Deputy Governors of the Bank in his discretion. Obviously, the distinction does not apply here.[1] Again, of the seven members of the Federal Railway Authority three are to be appointed by the Governor-General in his discretion, and the rest on the advice of Ministers. Other instances could be given.

Between these two terms there are two essential distinctions :

Firstly, as is clear from the wording of Sec. 9 (1), the Ministers are ' to aid and advise ' the Governor-General in the exercise of his functions except where he is required to act in his discretion; that is, in the sphere of the Governor-General's functions and powers in his ' discretion ', they are not in law entitled to advise or even to be consulted. While in respect of powers of the Governor-General in ' individual judgement' he can never act without consultation with, or the knowledge of, the Ministers. In fact, the initiative comes from the Ministers. In the former case, technically, the initiative is of the Governor-General. In the one case the Ministers act, subject to being overruled by the Governor-General : in the other case, the Governor-General acts, with or without consultation with the Ministers. In the second place, and flowing from the first distinction, in respect of the Governor-General's actions in his discretion, the responsibility for the action is his and his alone, even where he acts in deference to Ministers' wishes. He has, that is, primary as well as ultimate responsibility. But in respect of the other category, the initial and primary responsibility is of the Ministers and only in the last resort can the Governor-General overrule them

[1] What about Governor-General's assent to Bills in respect of non-Reserved subjects where the Ministers have the obvious responsibility—why discretion ?

in which case the responsibility shifts from the Ministers to the Governor-General. For instance, the management of the finances of the Federation is a Ministerial function. But the Governor-General may interfere if in his judgement interference is necessary for safeguarding the financial stability and credit of the Federal Government. Now, let it be assumed that the Federal Ministry follows a budgetary policy which actually results in financial instability. If, and so long as, the Governor-General does not interfere the entire responsibility falls on the Ministry and they cannot shift it on to the shoulders of the Governor-General, or even make him take a share of the discredit by pleading his acquiescence in their action in so far as he refrained from using his power of interference. Whether the Governor-General may be blamed for not using his power is a wholly separate issue. If, however, the Governor-General does interfere and then anything goes wrong, the responsibility is at once shifted on to him.[1]

It follows also as a constitutional principle that wherever the Governor-General is required to act in the exercise of his individual judgement the presumption must be in favour of the acceptance of Ministerial advice. He is free to discuss and criticize, and to put the Ministers on their defence, but only in the very last resort is he justified in rejecting the advice of Ministers.[2]

It will be seen, therefore, that except where the Governor-General is required in specific terms to act in his discretion or in the exercise of his individual judgement, the responsibility of the Ministers is clear and their authority undisputed. The Governor-General cannot, within this sphere, interfere with the judgement of the Ministers though, of course, he is free to criticize, warn and expostulate. But as has already been stated, the limitations on Ministerial authority are extremely severe. To the extent of these limitations, there is a potential field of disharmony between the Ministers and the Legislature. To take, first, the question of the Governor-General overruling his Ministers in the exercise of his individual judgement

[1] Responsibility is used here in the sense of political or constitutional responsibility.

[2] This view should apply to all such functions as appointments in the individual judgement of the Governor-General.

in the discharge, for instance, of a special responsibility. Now, there may be two possible cases—(i) the contemplated action or inaction of the Ministers may be disapproved by a majority of the Legislature, or (ii) it may be approved by that body. In the first case the Governor-General's action does not bring about disharmony ; on the contrary it resolves the disharmony. Cases of this nature are likely to be very rare. In the other case, however, the acquiescence of the Ministers in the Governor-General's action brings them into conflict with the Legislature.

What, then, is the position of the Ministers when they are overruled by the Governor-General in the discharge of a special responsibility? 'The answer clearly is,' writes Professor Keith, ' that, having accepted office under the constitution which gives such powers, they should remain in office, when the Governor-General acts according to his plain duty under the constitution. . . . They can, of course, resign office, but it would be difficult to justify such action in view of their having taken office in full knowledge of the restrictions on their powers."[1] Their safeguard against error on the part of the Governor-General lies, says Professor Keith, in an appeal to the Secretary of State. Professor Keith's view is palpably unsound. It is undoubtedly true that the Act which gives powers to the Ministers does also impose certain specific duties and responsibilities on the Governor-General and an action of the Governor-General in the discharge of any such duty is wholly constitutional. The Ministers clearly have no responsibility for the consequences of an action taken under the Governor-General's direction. As Lord Linlithgow stated : ' Ministers bear no responsibility for the decision and are entitled—if they so desire—publicly to state that they take no responsibility for that particular decision or even that they have advised the Governor in an opposite sense."[2] Even so, the Ministers are not free from difficulty. In the first place, their acquiescence in the circumstances may, and most probably will, be construed by their supporters and

[1] Keith, *A Constitutional History of India*, p. 335.

[2] Statement on the Provincial constitutional deadlock issued in June 1937. This passage relating to the Governor's ' special responsibilities ' is equally applicable in the present case.

opponents as a sign of weakness and as the betrayal of a desire to cling to office. In that case they will stand to lose the confidence and respect of the electorate and of the Legislature. In the second place, the Ministers may very justifiably feel that they cannot properly discharge their responsibilities if they are unable to do what they think right and necessary.[1] Of course, they may not think it fit to resign if they are overruled on a minor issue. But it is not very likely either that the Governor-General would insist on having his own way on a minor point and thereby precipitate a crisis. Besides, it is well to remember that, for the proper development of a sense of responsibility among Ministers, it is highly desirable that they should be prepared to take full responsibility for their actions instead of being able to shirk it by throwing the blame on the Governor-General. It must, therefore, be held that resignation by Ministers is not only justifiable but may be desirable, even essential. It may be noted here that when the Ministries in Bihar and the United Provinces resigned on 15 February 1938, because they were overruled by the Governors of the respective Provinces on the question of the release of political prisoners, nobody suggested that their action was constitutionally improper or unjustifiable.

The Counsellors

The number of Counsellors is likely to be two, but power has been given to appoint a third if the Governor-General so desires. They will be appointed by the Governor-General in his discretion, but their salary and conditions of service will be prescribed by Order in Council.[2] It is not clear why the intervention of the King in Council has been provided for. Does it mean, for instance, that the King can make their office tenable during his pleasure instead of that of the Governor-General? In order to fix responsibility definitely on the Governor-General, it is desirable that their tenure should be during the pleasure of the Governor-General. The Counsellors are officials, but they need not be selected from among officials :

[1] This is how the Congress Ministries in Bihar and the United Provinces felt on the question of the release of political prisoners. See Cmd. 5674 of 1938.

[2] Sec. 11 (2).

in fact, the Governor-General will have the right to choose whomsoever he likes, including members of the Indian Legislature and Ministers, but once appointed the persons become officials and therefore lose their seats in the Legislature.

The Counsellors, like Ministers, will have the right to participate in all the proceedings of either Chamber of the Legislature, except that they shall have no right to vote.[1]

The Ministers and the Counsellors vis-à-vis the Governor-General

The constitutional status of Ministers is fundamentally different from that of Counsellors. As Sir Samuel Hoare put it, the Counsellors would not advise the Governor-General as the Ministers would ; they would be under the directions of the Governor-General. In other words, the Ministers will occupy the position of Ministers of the Crown in England, while the Counsellors will be mere advisers. The Ministers will be responsible and accountable for all actions of Government within their sphere ; they are in fact the Government. The Counsellors, on the other hand, are to assist the Governor-General in the management of the Reserved Departments. They are responsible to the Governor-General, and strictly speaking, it is not the Counsellors but the Governor-General who is responsible and answerable for the Reserved Departments. The Counsellors as heads of Departments are almost analogous to the permanent civil servants at the head of Departments. In strict theory, their action is the action of their principal, the Governor-General. The Reserved Departments are Governor-General's Departments and not Counsellors' Departments. In this connexion it may be noted that, in circumstances short of a breakdown of the Constitution, the Governor-General cannot dispense with Ministers, that is, the non-Reserved Departments must be in charge of Ministers ; but he need not appoint any Counsellor for the administration of a Reserved Department. The appointment of Ministers in respect of non-Reserved Departments is a constitutional necessity, while the appointment of a Counsellor to take charge of a Reserved Department is a matter of mere administrative convenience.

[1] Sec. 21.

The status of a Counsellor is totally different from that of an Executive Councillor of to-day. In law, an Executive Councillor, like the Governor-General, is appointed by, and is responsible to, the Crown : he is, therefore, legally independent of the Governor-General. A Counsellor, on the other hand, is appointed by and responsible to, the Governor-General. He is, in law, an agent of the Governor-General. Moreover, an Executive Councillor is part of the Government of India[1] and shares responsibility for every action of the Government of India, but a Counsellor, as already stated, has no such share of responsibility.

A Minister, again, differs from both these functionaries. He does not really owe his appointment to the Governor-General or the Crown, but to his position in the Legislature. He is accountable to the Legislature and not to the Governor-General or the Crown. He is in a position to put himself in solid opposition to the Governor-General. As the spokesman of the Legislature which is his master, it may indeed be his interest, not merely his duty, to do so. A Counsellor's allegiance is to the Governor-General and he cannot put himself in open opposition to the Governor-General, for in such a case he cannot continue in office.[2] This does not mean that his influence will be negligible. Given the multifarious duties of a Governor-General and his inexperience in the working of the Departments he is responsible for, it is at least probable that the real administration of those Departments will be largely in the hands of the Counsellors rather than those of the Governor-General. This is all the more likely if Counsellors are recruited from the Indian Civil Service.

How far the Governor-General's control in respect of the other Departments by means of his special responsibilities may, in disguise, be the control of some Counsellor, it is difficult to conjecture. The fear was expressed that if a third Counsellor were appointed and placed in charge of the

[1] For the Government of India technically means the Governor-General in Council.

[2] While it is improper and impossible for an Executive Councillor or a Counsellor under the 1935 Act publicly to manifest his dissent from the Governor-General, while in office, it is permissible and wholly proper for a Minister to declare publicly his difference of opinion from the Governor-General and even to criticize him.

special responsibilities of the Governor-General, then there would be considerable danger of his developing into a super-Minister, whose activities might result in interference with the work of the responsible Ministers.[1] This apprehension was regarded by the Joint Parliamentary Committee as altogether fantastic. To speak of a Counsellor being placed in charge of the special responsibilities was wholly to misapprehend their nature ; for they did not set apart a governmental or departmental sphere of action from which Ministers were excluded, or even one in which the Governor-General had concurrent powers with his Ministers.[2] This is all very true, for obviously by their very nature the special responsibilities cannot constitute a distinct sphere of Government. The British Indian Delegation must have been quite aware of it. What they obviously meant was that the third Counsellor, with nothing specially to do, might be engaged in watching whether any of the special responsibilities of the Governor-General was involved in any Ministerial action and, if so, in advising the Governor-General as to the course to be followed. Speaking about the Governor-General's staff, the Joint Committee observed that he would require an adequate staff with an officer of high standing at its head.[3] Supposing a Counsellor were to fill this position, a possibility which they did not rule out, it is not improbable that the consequence of which the British Indian Delegation were afraid might happen. The Counsellor would not, of course, become a super-Minister, but an officer of such high position advising the Governor-General from behind the screen might improperly influence the Governor-General, a total stranger to India, in a manner which would cause avoidable and unnecessary friction with responsible Ministers. In this context, it is pertinent to observe that, while it is desirable that the Governor-General should be well served, it is equally desirable that he should not be too much under bureaucratic influence. A strong personal Secretariat at the disposal of the Governor-General is fraught with two real dangers : (1) it may tempt

[1] See *Joint Memorandum by the British Indian Delegation*, par. 6.
[2] See *Report*, par. 188.
[3] *Report*, par. 189.

the Governor-General into greater interference with Ministers' activities, thereby widening a potential source of friction, and (2) it is likely to maintain too strong a bureaucratic control in administration by the backdoor, a wholly undesirable thing. A 'kitchen Cabinet' of the Governor-General, out of sympathy with the responsible Ministers, is likely to act as sand in the machinery of Government. If a Royal entourage in sympathy with the Cabinet is considered desirable for the smooth working of responsible government in Great Britain where the Ministers are really responsible, it stands to reason that a Viceregal entourage out of sympathy with the Government of the day is a positive danger to the proper functioning of responsible government in India.

The Governor-General and the Departments

The responsibility of the Governor-General for the administration of the Reserved Departments is immediate and direct ; but his responsibility for the other Departments is only contingent. It necessarily follows that in respect of a Reserved Department the Governor-General as against a Counsellor should have a real and effective control in its administration. Indeed his responsibility will be greater than that of the Governor-General to-day for a Department under an Executive Councillor. All important matters arising in a Reserved Department must necessarily go to the Governor-General for approval. It seems that the authority of a Counsellor in respect of, say, the Defence Department will be somewhat intermediate between the authority of the Secretary in the Defence Department to-day and that of the Member in charge of the Department. The actual position will, of course, largely depend upon the personal equation of the Governor-General and the Counsellor concerned.

In respect of non-Reserved Departments the participation of the Governor-General is intended to be immensely less. Whereas under the present system nothing of any importance can be done in any Department without the knowledge and approval of the Governor-General, under the system of responsible government most matters arising in these Departments will be decided either on the responsibility of

individual Ministers or of the Ministry collectively, the important matters being reported to the Governor-General for information rather than approval. Only where any of his special responsibilities is, or is likely to be, involved, will the approval of the Governor-General be sought and obtained. Even here the decision is more likely to be that of the Ministers than of the Governor-General.

Under the new Constitution the system of regular weekly interviews at present given by the Governor-General to the Secretaries must cease. Any regular communication, oral or written, between the Governor-General and the Secretary of a Department will be indefensible in principle and undesirable in practice. That will make the position of the Secretary who belongs to a service beyond the Ministers' control, very delicate, and it will lead to the Governor-General's participation in the day-to-day administration—a position utterly incompatible with the theory of responsible government. In a hybrid constitution such as this, it is desirable that, without relinquishing his right to call for the Secretaries or other subordinate officers, the Governor-General should, except for very cogent reasons, confine his communications and discussions to the Ministers only.

The Governor-General and the Finance Department

Being in charge of the largest spending Department, the Governor-General will naturally be in close touch with the Finance Department. Besides, he has the special responsibility of safeguarding the financial stability and credit of the Federation and has, therefore, the right of looking into matters like budgetary arrangements and borrowings. In order that the Governor-General may not suffer from the lack of expert advice, the Act empowers him to appoint a Financial Adviser. This officer, if appointed, will have the duty (*a*) of advising the Governor-General in the discharge of the special responsibility just mentioned, and (*b*) of advising the Ministry with respect to any financial matter on which he may be consulted.[1] It is intended that the Financial Adviser will be an official of high position with an office in the Finance Department and a

[1] Sec. 15 (2).

staff of his own. He will keep himself familiar with all that is proceeding in the Finance Department. If he thinks that the Government are contemplating any measure which will touch upon the special responsibility of the Governor-General regarding finance, it will be his duty at once to report that matter to the Governor-General.[1] It must, however, be remembered that Finance is a non-Reserved subject and there will be a responsible Minister dealing with it. Neither the Governor-General nor the Financial Adviser will have anything to do with the day-to-day administration of the Finance Department. In fact, the Financial Adviser has no executive power at all. Still his office is of enormous importance and if he is a man in whom the Ministry feel no confidence, he will be a potential source of friction and misunderstanding between the Governor-General and the Ministers. To avoid this possibility it is provided that the Governor-General should appoint the Financial Adviser after consultation with the Ministers, and the Joint Committee felt certain that the Governor-General would always endeavour to secure the appointment of a person acceptable to his Ministers. As the appointment is optional, it would be wise for the Governor-General to do without this officer, in the beginning at any rate; for Indian opinion has not looked with favour upon the creation of this office.

The Ministers and the Reserved Departments

In strict law, Ministers have neither any responsibility for, nor any power in respect of, any Reserved Department. But it is contemplated that in practice they should be taken into confidence. The Instrument of Instructions, while enjoining upon the Governor-General the desirability of joint consultation, makes particular reference to the subject of Defence: 'Seeing that the Defence of India must to an increasing extent be the concern of the Indian people . . . Our Governor-General should have regard to this instruction in his administration of the Department of Defence.'[2] He

[1] See Sir Samuel Hoare's evidence before the Joint Select Committee, *Secretary of State's Evidence*, Q.8284.

[2] Clause XVII. See Appendix D.

is especially directed to bear in mind the desirability of ascertaining the views of his Ministers in respect of (*a*) the policy of Indianization of the Defence Services, or (*b*) the employment of Indian Forces outside India.[1] The Instructions further provide that, although the financial control of Defence administration must be exercised by the Governor-General in his discretion, nevertheless the Federal Department of Finance shall be kept in close touch with this control by such arrangements as may provc feasible, and that the Federal Ministry and, in particular, the Finance Minister shall be brought into consultation before estimates of proposed expenditure for the service of Defence are settled and laid before the Federal Legislature.[2]

The provision regarding consultation with Ministers on the question of lending Indian troops for service outside India is extremely illogical and unsatisfactory. The Governor-General has, of course, to look after the defence of India on his own responsibility.[3] From that premise it does not follow that he should have the same unfettered discretion in respect of a matter which has nothing to do with India's defence. In a situation like this the advice of the Ministry ought to be binding. If, as the Joint Committee suggest, any expenses on this account would require the sanction of the Federal Legislature,[4] the operation itself should be subject to Ministers' approval. The Joint Committee had no doubt that in practice the Governor-General would give the greatest weight to the advice of the Federal Ministry before reaching his final decision.[5] In practice the attitude of Ministers will almost be decisive, for in a situation of that kind a Governor-General will seldom risk the opposition of the Ministry, the Legislature and the public. A plain recognition of this fact by the Instrument of Instructions will be conciliatory to Indian sentiment as well as in the best interest of Great Britain.

As to Indianization of the Army no provision is made

[1] Clause XVII. See Appendix D. [2] See Clause XIX.

[3] The expression 'Defence of India' ought to be understood in its ordinary sense. The Joint Committee's words, 'in the broadest sense' (*Report*, par. 178) are ambiguous and mischievous. For in that sense it may be argued that the sending of Indian soldiers to fight Japan in China is necessary for the defence of India.

[4] *Report*, par. 178. [5] Vide ibid.

in the Act. Curiously enough, the Act requires the recruitment of sons of persons who have been in the military or civil service of the Crown in India,[1] but it does not even express a pious wish about the sons of the soil. The arguments used in respect of Indianization of the Army are familiar enough: similar arguments have been used in respect of every other Indian demand. The history of the Soviet Army, created out of untried materials since 1917, and the exploits of the Spanish Republican Forces and of the Chinese Army to-day, would convince any impartial observer that many of the obstacles are magnified through the powerful lens of British vested interests. Harmonious relations between the Governor-General and the Ministry would require a radical change in the British attitude towards the problem of the entry of Indians into their Defence forces.

The British Indian Delegation observed that the reservation of the Department of Defence would have the effect of depriving Ministers of the influence over Army policy which under the existing constitution the Indian Members of the Governor-General's Council are able to exert. Consequently they urged (1) that the Defence Counsellor should be a non-official Indian, preferably an elected Member of the Federal Legislature, or a State representative therein; (2) that the control now exercised by the Finance Member and the Finance Department should be continued, the Governor-General having the final voice in case of difference of opinion; and (3) that all questions relating to Army policy and the annual Army budget should be considered by the entire Government, comprising all the Counsellors and the Ministers; in cases of difference the decisions of the Governor-General prevailing. These suggestions, modest as they were, proved unacceptable to the over-cautious Joint Committee.[2] On the first point they were of opinion that the Governor-General's choice ought not to be fettered in any way and that he must be free to select the man whom he considered best fitted for the post. This sounds very plausible; but it must be noted, if the past is any index to the future, that the Governor-General is more likely to discover the requisite fitness in men

[1] Sec. 239.

[2] *Report*, par. 177.

of his own race than in Indians. It may also be pointed out here that the appointment of an Indian is not necessarily of much value. It is far less undesirable that a Britisher should be in charge of Defence than that an Indian without any strength of character, and it is not difficult to find one, should be used as a scape-goat of British policy. What is really wanted is amenability to the control of the Legislature; an Indian of character and personality appointed as Counsellor is, after all, a second best. In turning down the second suggestion, the Committee observed that the control of the Military Finance and Military Accounts Departments by the Department of Defence followed as a necessary corollary of the reservation of Defence, since the responsibility for the expenditure which they would supervise belonged to the Governor-General. It seems, however, that the conclusion is not a necessary corollary, as the Committee suggested. The Governor-General is undoubtedly responsible for the expenditure on Defence. But that does not necessarily imply that the scrutiny of that expenditure must also be in his hands. In any sound scheme of financial administration, there must be one Department to keep an eye on Departmental extravagance and waste. It is desirable that the Finance Department should be able to see the inside working of all Departments of Government. Provided that it is made clear that in respect of matters touching the Defence Department the usual supervision and control by the Finance Department is subject to the overriding control of the Governor-General, there is no reason why, either on principle or on grounds of administrative efficiency, the suggestion of the Indian Delegation should be rejected, especially when the Joint Committee itself admits that the transfer of control would not preclude an arrangement whereby the Finance Department 'is kept in close touch with the work of both these branches',[1] and does in fact recommend the making of some such arrangement.[2] The proposed Instruction[3] on this matter is unsatisfactory because

[1] The Military Finance and the Military Accounts Departments. Vide *Report*, par. 177.

[2] Vide ibid.

[3] See Clause XIX, Appendix D.

of its vagueness. There should be a definite instruction that the Finance Department shall have the usual control over these two Departments, subject to the limitation already stated. Otherwise, there would be administrative inconvenience and inefficiency as well as friction. One should have thought that the constitution-makers would avoid friction on small matters like this when there were already so many major points of conflict.

As to the third suggestion, the Committee observed that it was not only desirable in principle, but inevitable in practice, that the Federal Ministry, and in particular, the Finance Minister, should be brought into consultation before the proposals for Defence expenditure were finally settled.[1] Sir Samuel Hoare[2] expected that, although the Governor-General would be solely and exclusively responsible for the Defence expenditure, the Defence Budget would have the full support of the Federal Government behind it. In practice, the estimates for the Defence Department will, in the first instance, be discussed between the Finance Minister and the Defence Counsellor, and later between the Ministry and the Counsellors. The Governor-General will act as mediator, and, if necessary, ultimate judge. The Ministry, if united and strong, will inevitably have considerable influence on Defence policy and expenditure. A Governor-General will normally hesitate to come to the Legislature with a Defence Budget, even though non-votable, which is disapproved by the Ministry. He cannot lightly follow a policy which is openly repudiated by the responsible Ministers.

There is no specific mention of the Department of External Affairs in the proposed Instructions. There is the general direction as to the desirability of joint consultation, which has already been quoted. 'While the primary ambit of the Department', observed the third Round Table Conference, 'would be matters involving relations with foreign countries, many subjects which involve such relation (e.g. the multifarious questions which might be involved by commercial treaties) would necessarily be dealt with, and discussed,

[1] *Report*, par. 177.
[2] Evidence before the Joint Committee, Q.7883.

by the Ministers responsible for those subjects in the domestic sphere, by whose advice the Governor-General would be guided except in so far as he felt that his personal responsibility for the general subject of external affairs made it incumbent upon him to act otherwise than in accordance with the advice tendered."[1] They emphasized 'the fact that a matter which, in the domestic sphere, is in charge of a Minister will not necessarily be removed from his province and included for the time being in the Reserved portfolio of External Affairs merely by reason of the fact that the matter happens to become the subject of international negotiations'.[2] The Joint Committee appear to have approved of the above view, though not in clear terms. They assumed that in respect of commercial or trade agreements, the arrangements existing in England between the Foreign Office and the Board of Trade would be adopted in India. But they were clearly of opinion that all agreements with foreign countries must be made by the Governor-General, even if on the merits of a trade or commercial issue he was guided by the advice of the appropriate Minister.[3]

The Ministers and other Personal Powers of the Governor-General

In the previous chapter we have indicated the range and importance of the functions in the performance of which the Governor-General is not, in theory, a constitutional head—matters, that is, in respect of which the Governor-General is free to act without consulting Ministers, or in respect of which he is free to reject the considered advice of his Ministers. It has been made clear that neither is the range of Ministers' functions co-extensive with the functions of the Federal Government, nor are the Ministers undisputed masters in their own limited sphere. Indeed, a strict interpretation of the legal powers of the Governor-General will reduce the responsibility and authority of the Ministers almost to nullity. As a matter of strict law, while it is possible for the Governor-General to thwart and control the Ministers in many ways, there is no internal legal check on the Governor-General upsetting the apple-cart by a too liberal use of his legal powers.

[1] *Report*, p. 27. [2] ibid., p. 27. [3] ibid., par. 184.

In practice, however, the Governor-General's powers are not likely to be interpreted strictly and that for two important reasons. Firstly, the basic conception of the Constitution is the principle of responsible government, and the safeguards and reservations limit rather than abrogate that principle. In fact, the fundamental difference between the Montagu-Chelmsford Reforms and the new Constitution, speaking of the Centre, is that the former maintained intact the principle of autocracy but tempered it by conceding a position of influence to the Legislature ; while the new Constitution establishes Ministerial responsibility at the Centre, but tempers it by giving certain overriding powers to the Governor-General in the field of Ministerial responsibility and full legal power of control over a definite sphere of the Federal Government. These limitations are undoubtedly very severe. The Prime Minister, however, declared that the reserved powers during the period of transition would be so framed and exercised as not to prejudice the advance of India through the new constitution to full responsibility for her own government.[1] Any literal interpretation of the Governor-General's legal powers will cut at the very root of the declared principle of Central responsibility. Responsible government will evaporate if the special responsibilities are resorted to in any substantial degree. As regards Reserved subjects, they must be administered as far as possible in conformity with the views of the Ministry. As regards the other discretionary powers of the Governor-General, the same remark would apply. There are some powers in this category which have to be exercised practically according to the Ministers' advice. One such instance is the Governor-General's assent to Bills. Ministers cannot be really responsible for the subjects under their charge unless they are in a position to ensure the Governor-General's acceptance, in general, of their advice in respect of Bills relating to those subjects. The summoning, proroguing or dissolving of the Legislature will, in practice, be very largely influenced by the Ministers.

[1] Statement of the British Government's policy made by the late J. R. MacDonald at the final Plenary Session of the 1st Round Table Conference on 19 January 1931. Vide *Proceedings*, p. 506. This statement has never been repudiated.

The Federal Ministry and Paramountcy

What is the position of the Ministers in respect of the exercise of Paramountcy? In strict law, they have no *locus standi* in the matter. The subject of Paramountcy has been entirely excluded from the purview of the Ministers: even the Governor-General as such has been kept off the field lest he should be contaminated by contact with the responsible Ministers. Theory apart, two things seem quite clear. Firstly, administratively it is inconceivable that the Crown Representative would be a person other than the Governor-General; for any separation of the two offices is bound to give rise to many thorny problems. Secondly, given the nature of Paramountcy and the main justification for its wider import in recent times, it is impossible for the Governor-General in his capacity as Crown Representative not to be influenced by the advice of the Ministers. Surely in matters of succession to the Rulership and other dynastic matters, or salutes, precedence and similar matters, the Ministers will have nothing to do. But the efficient conduct of the Federal Government may be extremely difficult if in respect of many other matters the Federal Ministry is unable to secure that the Indian States, outside the Federal sphere, act in a given manner for the interests of India. Indeed, as in the past, the power of Paramountcy must be used to secure that end; and the Governor-General is bound to consult with, and often act on the advice of, the Ministers in respect of relations with the States in the sphere of Paramountcy.

The Federal Cabinet

Though, in law, the Reserved Departments are distinct from the rest of the Federal Government and the constitutional responsibility is also quite distinct, in practice it is neither possible nor desirable to keep them as separate water-tight compartments. Mutual consultation and joint discussion between the two halves of Government are clearly contemplated by the framers of the Constitution. As the White Paper stated: 'Although the Reserved Departments will be administered by the Governor-General on his sole responsibility, it would be impossible in practice for the

Governor-General to conduct the affairs of these Departments in isolation from the other activities of his Government, and undesirable that he should attempt to do so, even if it were in fact possible. A prudent Governor-General would therefore keep his Ministers and the advisers whom he has selected to assist him in the Reserved Departments in the closest contact; and, without blurring the line which will necessarily divide on the one hand his personal responsibility for the Reserved Departments, and, on the other hand, the responsibility of Ministers to the Legislature for the matters entrusted to their charge, he would so arrange the conduct of executive business that he himself, his Counsellors and his responsible Ministers, are given the fullest opportunity of mutual consultation and discussion of all matters—and there will necessarily be many such—which call for co-ordination of policy.'[1] Accordingly, the Instrument of Instructions will provide as follows: 'Although it is provided in the said Act that the Governor-General shall exercise his functions in part in his discretion and in part with the aid and advice of Ministers, nevertheless it is Our will and pleasure that Our Governor-General shall encourage the practice of joint consultation between himself, his Counsellors and his Ministers.'[2] That is, the Governor-General is directed to secure the opinion of the Ministers as regards the Reserved subjects, especially in regard to the administration of the Department of Defence.

The Governor-General in his discretion, after consultation with his Ministers, is required to make rules for the more convenient transaction of the business of the Federal Government, that is, of the entire Federal Government including the Governor-General's Departments.[3] The rules must include provisions requiring Ministers and Secretaries to Government to transmit to the Governor-General all such information with respect to the business of the Federal Government as may be specified in the rules, or as the Governor-General may otherwise require to be so transmitted, and in particular requiring a Minister to bring to the notice of the

[1] Introduction, par. 23. Cmd. 4268.
[2] Clause XVII. See Appendix D.
[3] Sec. 17.

Governor-General, and the appropriate Secretary to bring to the notice of the Minister concerned and of the Governor-General, any matter under consideration by him which involves, or appears to him likely to involve, any special responsibility of the Governor-General.[1]

Provision will obviously be made by these rules in specific terms for consultation between the Ministers, the Counsellors and the Governor-General. For harmonious and efficient administration it will be necessary to provide, as at present, that a Department should consult another Department when the latter is concerned, whether it is a Governor-General's Department or not. But so far as the Ministers' Departments are concerned any dispute between two Departments should go to the Prime Minister who will decide it himself or refer it to a meeting of the Council of Ministers. Similarly, in respect of difference between two Reserved Departments the matter should go to the Governor-General for disposal. But where a difference arises between a Minister and a Counsellor, the matter will obviously go to the Governor-General who will either seek to find an agreement or refer it to a meeting of Ministers and Counsellors for discussion. There will be in all probability three kinds of meetings : (1) meetings of the Ministers including the Governor-General, that is, meetings of the Council of Ministers ; (2) meetings of the Governor-General and his Counsellors ; and (3) meetings of the Ministers and Counsellors, which may conveniently be called meetings of the Governor-General's Cabinet. Meetings of the Council of Ministers are recognized by the Act. The Governor-General may, in his discretion, preside over them.[2] Although the Act gives the Governor-General unfettered right to preside at these meetings, it is likely that convention will soon grow up on English and Dominion lines. It is fundamental that even from the outset the Governor-General should preside only when any of his special responsibilities is involved, so that he may hear the Ministers' point of view and give them his own in the hope that mutual discussion may resolve any difference in points of view. Otherwise, the Prime Minister ought to preside. Frequent presence of the Governor-General in

[1] Sec. 17 (4). [2] Sec. 9 (2).

meetings is undesirable at least for two reasons : First, it will undermine the Prime Minister's authority and influence among his colleagues and militate against Ministerial solidarity; secondly, the Governor-General will tend to have more influence on the determination of policy than he ought to have and will correspondingly have to share responsibilities which are properly those of the Ministers. Any insistence by the Governor-General on considerable participation by himself in Council meetings is likely to cause unnecessary irritation and may result in the Prime Minister calling informal meetings of Ministers immediately before a formal meeting of the Council in order to thrash out internal differences. This will reduce the meeting of Ministers presided over by the Governor-General into a mere formality corresponding more to a meeting of the British Privy Council than that of the Cabinet.[1]

In meetings of the Cabinet, as we have termed them, the Governor-General may naturally preside. Even here the Prime Minister ought to be allowed to preside unless the Governor-General feels that he should take part in the discussion or hear both sides before reaching his own decision respecting a Reserved Department matter.

The Cabinet, in the present sense, will be a body without any organic unity : the Ministers will be responsible to the Indian Legislature, while the Counsellors will be responsible through the Governor-General to Parliament. Divided government is always weak government. In order to minimize the evils of division it was suggested, for instance, by Sir Tej Sapru,[2] that the Counsellors should form part of the Ministry, entering and leaving office with the Ministers, and participating in all meetings of the Ministry. Under this scheme, all business of Cabinet importance was to come before the entire Cabinet, whether it belonged to a Reserved or a Minister's Department. To give the Cabinet an appearance of

[1] It is interesting to note that Congress Cabinets in the Provinces have already started the practice. In view of the insistence of Governors to preside at meetings of the Council of Ministers, the Congress Premiers usually call informal meetings of their colleagues and arrive at appropriate decisions there, and at the formal meetings business is quickly finished practically without any discussion.

[2] Vide *Proceedings of the Federal Structure Sub-Committee of the 1st Round Table Conference*, p. 147.

unity the Counsellors were to resign along with the Ministers, though the Governor-General would be at liberty to re-appoint all or any of them. This scheme was expected to enable both groups of advisers of the Governor-General to present a united front to the Legislature by the adoption of a common policy. Sir Tej perhaps expected that the Reserved Departments would become more amenable to Ministerial control under this scheme than otherwise. Sir Samuel Hoare opposed the idea of collective responsibility on the ground that there was definitely a distinction between these two classes of people, and if there was a distinction it was much better not to pretend that there was no such distinction. Of course, he said, being practical men they would in practice work an arrangement like that by mutual consultation.[1] The Joint Committee took the same line of argument as Sir Samuel. They regarded this artificial arrangement as quite inadmissible. 'The Counsellors could not by a simulated resignation diminish their responsibility to the Governor-General, nor would the Government become any more unitary than it was before.'[2] The Committee were, however, clearly of the opinion that it would be difficult, if not impossible, to conduct the administration of the Department of Defence in complete isolation from other Departments and that the maintenance of close and friendly relations with Departments under the control of the Ministers could only increase its efficiency. They warmly approved the principle of joint deliberation which the White Paper proposed for embodiment in the Governor-General's Instrument of Instructions. It is interesting to note that this principle finds no place in the Act, while the same Act requires the Governor-General to frame rules of business requiring Ministers and Secretaries to bring to the Governor-General certain types of cases.[3] Indeed, one remarkable feature of the Act is the avoidance of incorporation therein of many provisions favourable to the interests of India on the ground that they were, on principle, more appropriate for conventions or the Instrument of

[1] *Proceedings of the Federal Structure Sub-Committee of the 2nd Round Table Conference* on 28 October 1931, p. 309.

[2] *Report*, par. 187. [3] See Sec. 17 (4).

Instructions, and the inclusion of other matters favourable to British interests which, on the same principle, should have been excluded from the Act.

The Joint Committee recognized the difficulty inherent in a dyarchical system and confessed that its successful working would require 'tact and sympathy of no common order' on 'both sides'.[1] The White Paper stated that its proposals proceeded on the basic assumption that every endeavour would be made by those responsible for working the Constitution to approach the administrative problems which would present themselves in the spirit of 'partners in a common enterprise'.[2] What, however, is the common enterprise? If common enterprise primarily means, as it ought to, the securing of the good of India and carrying her to a full and speedy realization of nationhood and all that it implies, then there is a common enterprise. In that case there will not be any acute friction. It would, however, require a totally different outlook in the Department of Defence than has hitherto been the case.

[1] *Report*, par. 188.

[2] Introduction, par. 26.

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THE GOVERNOR-GENERAL AND THE SECRETARY OF STATE FOR INDIA

As already stated, the Viceroy is not only the head of the Indian Federation and the Representative of the Crown in its relation with the Indian States, but also the agent of the British Government.

For an adequate appreciation of the position assigned to the Viceroy and Governor-General by the Act of 1935, and of the nature and extent of the shifting of the centre of political gravity from Whitehall to India, it is essential to consider the place of the Secretary of State in the new constitutional structure. The grant of Provincial Autonomy and the establishment of Federation and of Central responsibility necessitated a fundamental change in the position hitherto occupied by the Secretary of State.

The Act of 1935 completely changes the legal position of the Secretary of State for India *vis-à-vis* the Governments in India. Under the old Act, these Governments had no independent legal status. They could not sue or be sued or hold property in their own names. They were the agents of the Secretary of State in whom was vested the right of superintendence, direction and control over the civil and military government and revenues of India. The new Act gives the Provincial and Federal Governments distinct juristic personality. They are no longer agents of the Secretary of State.[1] The revenues of the Indian Governments would no

[1] The necessity for removing the agency-relation was thus stated by the Joint Committee: 'It is clear that, in any new Constitution in which autonomous Provinces are to be federally united under the Crown, not only can the Provinces no longer derive their powers and authority from devolution by the Central Government, but the Central Government cannot continue to be an agent of the Secretary of State. Both must derive their powers and authority from a direct grant by the Crown.' *Report*, par. 153.

longer vest in him. Even under this Act the Secretary of State has an important rôle in the Governments in India, but apart from certain specific powers in respect of the interests of some of the Services, he has no direct control over any of the Governments in India. In fact, his real control will be indirect, that is, through his control over the Governor-General and through him over the Governors. Even so, this control is strictly limited to matters in respect of which final power still resides in the Governor-General or the Governor, as the case may be.

The Secretary of State has, under the Act, certain specific powers and a general power of control over the Governor-General acting in his discretion or in the exercise of his individual judgement.

First, as to the specific powers of the Secretary of State.

Acts passed by the Indian Legislatures are subject to disallowance by the King in Council within one year. The King's action will, of course, be guided by the advice of the Secretary of State. It seems, however, that the veto is seldom likely to be used.

The Act further empowers the Governor-General or the Governor, in his discretion, to reserve a Bill for the consideration of the King or of the Governor-General respectively. But their Instruments of Instructions require them to reserve Bills touching certain matters. Thus a Governor is required to reserve for the consideration of the Governor-General (*a*) any Bill which repeals or is repugnant to the provisions of any Act of Parliament extending to British India; (*b*) any Bill which, in his opinion, would, if it became law, so derogate from the powers of the High Court as to endanger the position which the Court is by the Act designed to fill; (*c*) any Bill regarding which he feels doubt whether it does or does not offend against the provisions of the Act in bar of commercial or other forms of discrimination (chapter III of Part V) or Sec. 299 of the Act; (*d*) any Bill which would alter the character of the Permanent Settlement.

Similarly, the Governor-General is bound to reserve for the consideration of the King in Council (which means the Secretary of State) any Bill, falling under the above categories,

whether passed by the Federal Legislature or by a Provincial Legislature and reserved for his consideration.[1]

The result is that in respect of all compulsorily reserved Bills the final word lies directly with the Secretary of State. This applies as much to Provincial Bills as to Federal Bills, for, as will be clear from the above two lists, Bills which are compulsorily reservable by the Governor for the consideration of the Governor-General are also the types of Bills, which the Governor-General cannot assent to himself, but must reserve for the King in Council.

The Secretary of State and the Services

The Secretary of State may specify what rules, regulations and orders affecting the conditions of service of all or any of the Indian Forces shall be made by the Governor-General only with his previous approval.[2] The Secretary of State will have the same right of entertaining appeals from the members of these Forces as he had under the old Act.[3]

The Secretary of State will continue to recruit the personnel of the Indian Civil Service, the Indian Medical Service (Civil) and the Indian Police Service, until Parliament otherwise determines. He may also make appointments to any service or services which he deems necessary to establish for the recruitment of suitable persons to civil posts in connexion with the discharge of any of the discretionary functions of the Governor-General.[4]

The Secretary of State will also by rules specify what civil posts (other than those in connexion with the discretionary functions of the Governor-General) are to be reserved for the members of the services recruited by him. And, except as otherwise provided in the rules, no such post may, without the previous sanction of the Secretary of State,

(*a*) be kept vacant for more than three months; or
(*b*) be filled by appointing any other person; or
(*c*) be held jointly with any other reserved post.

Lest any Secretary of State and his Advisers should in a moment of weakness or generosity fail adequately to

[1] See Appendix D., Clause XXVII.
[2] Sec. 235.
[3] Sec. 236.
[4] Sec. 244.

safeguard the vested interests of the Services, these rules are subject to the subsequent approval of both Houses of Parliament.[1]

The Secretary of State will have full powers to deal with the case of any person serving in a civil capacity in India in a manner which he deems just and equitable.[2]

Besides, in respect of all appointments to be made directly by the Crown (except those of the Governor-General and the Commander-in-Chief) the Secretary of State for India is the constitutional adviser of the King.[3]

Next, as to the general powers of the Secretary of State.

Sec. 14 (1) lays down that 'In so far as the Governor-General is by or under this Act required to act in his discretion or to exercise his individual judgement, he shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given to him by, the Secretary of State.' There is an identical provision in respect of the Governor of a Province in so far as he is required to act in his discretion or to exercise his individual judgement, except that 'the Governor-General in his discretion' is substituted for the Secretary of State.[4] Now, the Governor-General acting in his discretion is subject to the superintendence and control of the Secretary of State; hence the Governor is, in respect of his acts in his discretion or in the exercise of individual judgement, subject to the superintendence and control of the Secretary of State. Considering the extent and importance of the powers of the Governor-General and of the Governors respectively, in their discretion and in the exercise of individual judgement, it must be clear that the Secretary of State has, even under the new Constitution, enormous powers of control over the Governments in India.

The extent of Parliament's supervision will be limited to the area within which the Governor-General or the Governor has authority and is therefore responsible to the Secretary of State. In accordance with the well-known Parliamentary

[1] Sec. 246. [2] Sec. 247 (7).

[3] In the exercise of his functions as the Crown's Representative the Viceroy will, of course, be fully under the superintendence and direction of the Secretary of State, acting on behalf of the Crown. See Appendix B, Clause 7.

[4] Sec. 54.

practice regarding questions and answers, namely, that a question should not be put to a Minister unless he is responsible for the subject-matter of the question, the activities of Indian Ministers in their own fields will not be reviewed in Parliament. As Mr Chamberlain said in answer to Mr Churchill :

'I suggest to the House that the broad general guiding principle which ought to be adopted as to the admissibility of questions on Indian provincial affairs is that such questions ought not now to be regarded as in order unless it can be shown either that the action at issue was taken by the Governor without consulting his Ministers, or against their advice, or, alternatively, that the Governor was in possession of powers applicable to the case which in fact he failed to exercise."[1]

The Prime Minister suggested that even this right ought to be 'used with discretion and restraint, and that His Majesty's Government must themselves exercise a careful discretion as to the extent to which it is expedient in any given case to supply information'.[2] The above observations made with reference to the Provincial sphere would apply, *mutatis mutandis*, to the Federal Government also.[3] In view, however, of the existence of the Reserved subjects and the large number of specific powers exercisable in the Governor-General's discretion or individual judgement, the scope of Parliamentary criticism would still be considerable.

What principle, if any, is to guide the Secretary of State in the exercise of his powers of superintendence? The only guidance given by the Act is that before giving any directions under the section in question[4] the Secretary of State must satisfy himself that nothing in the directions requires the Governor-General to act in a manner inconsistent with any Instrument of Instructions issued to him by His Majesty.[5] The same remark applies to the Governor-General's directions to the Governor of a Province in the exercise of the former's power of superintendence.[6] It is for the Secretary of State, or the Governor-General, as the case may be, to decide

[1] *House of Commons Debates*, 17 June 1937, vol. 325, col. 556.
[2] ibid.
[3] The diminution of Parliamentary inquisitiveness will necessarily lead to a lesser disposition at Whitehall to interfere with the authorities in India.
[4] Sec. 14 (1). [5] Sec. 14 (2). [6] Sec. 54 (2).

whether a direction is or is not contrary to any provision of the Instrument of Instructions. Assuming that a direction is given which is patently contrary to an Instruction, two questions arise—firstly, is it valid and is any action in conformity therewith valid? Secondly, is the Governor-General bound to obey it? On the first question, it must be held that the answer is in the affirmative, for clearly the Courts have no jurisdiction in the matter[1] and an action otherwise valid does not become invalid merely because it contravenes a provision of the Instrument of Instructions. The second question must also be answered in the positive. The Commission of the Governor-General directs him to exercise his powers according to 'such Orders and Instructions' as he may receive from the King or the Secretary of State.[2] Of course, the Governor-General's action is valid, even if he acts in disregard of a direction of the Secretary of State;[3] yet as a servant of the Crown, he cannot disregard a direction given by the Secretary of State who is the constitutional adviser of the King. This is the position in law. The political responsibility for such a direction is, however, a different matter.

The Secretary of State is perfectly justified in giving any direction to the Governor-General so long as it does not contravene the Instrument of Instructions.[4] But the real question of political importance is this: what relation should such direction have to the wishes of the Indian or Provincial Legislature and the Ministry? We have to consider two cases: (1) where the Governor-General or the Governor is in agreement with the Ministry and the Legislature; (2) where he differs from the Ministry and the Legislature. Before taking up these questions it is desirable to understand the principle underlying the Secretary of State's control. This is based upon the constitutional principle that the Executive should be responsible to the Legislature. Where it is not responsible to an Indian Legislature, it must be responsible to Parliament. That is why in the sphere of the Ministers the

[1] Sec. 13 (2). [2] Clause III. See Appendix C. [3] Sec. 14 (1).

[4] The question of the validity of a direction which goes against the Instrument of Instructions has been discussed in the preceding paragraph. All these remarks apply, *mutatis mutandis*, to the directions given by the Governor-General to the Governors under Sec. 54.

Secretary of State has no control. But Parliament was not prepared to make the Executive responsible to the relevant Legislature over the whole sphere of Government. Accordingly, the Governor-General or the Governor is responsible to Parliament to the extent that he is irresponsible in India.[1]

Parliament's control through the Secretary of State, if British statesmen mean what they say, is to be presumed to be actuated by the interests of India. The Secretary of State is not justified in interfering where the Governor-General or the Governor and the Legislature agree. For obviously he cannot be a better judge of India's interests than the latter. On the other hand, where the Governor-General or the Governor disagrees with the Legislature, the Secretary of State's interference must not imply automatic support of the Governor-General's action. For that would surely put a heavy premium on autocracy.

On the contrary, the correct constitutional principle seems to be that the Secretary of State ought to require the Governor-General or Governor to justify his point of view, and in the absence of quite convincing reasons, to direct him to fall in line with his Ministers. In a system of responsible government with a large and representative Legislature the only rational justification for the Secretary of State's power of control is that it should serve as a check on any autocratic conduct on the part of the Governor-General or Governor or any misuse of power. Any other view seems hardly compatible with the professed objective. Any other view is likely to cause unnecessary friction. Let us illustrate. The introduction of a Bill to alter the rate of exchange requires the previous approval in his discretion of the Governor-General.[2] If the Ministry want to introduce such a Bill and the Governor-General is agreeable, the Secretary of State ought not to direct him otherwise ; because, *ex hypothesi*, there is no question

[1] cf. 'In so far as the Governor-General or a Governor is not advised by Ministers, the general requirements of constitutional theory necessitate that he should be responsible to His Majesty's Government and Parliament for any action he may take. . . . In the case of a Governor the chain of responsibility must necessarily include the Governor-General.' *The White Paper of 1933*, Introduction, par. 43.

[2] Sec. 153.

of the Governor-General being autocratic. On the other hand, if the Governor-General is unwilling to sanction the introduction of the Bill the Secretary of State ought to require the Governor-General to satisfy him by convincing arguments that the action is clearly justifiable—only then can the Secretary of State's control have a meaning.

The constitution is one which has proved unacceptable to instructed political opinion in India. The safeguards are frankly irritating and not neccessarily in the interests of India. The Governor-General has been given a very powerful but unenviable position. If it were possible for him to use his large powers demonstrably in the interests of India, things might be easier. But one point is quite clear. An otherwise delicate position of the Governor-General will become infinitely more difficult if there is any suspicion in the minds of the Ministers and the Legislature that his refusal or unwillingness to see eye to eye with them is due to any instructions from Whitehall. The less the interference of the Secretary of State the better will it be both for India and England.

APPENDIX A.[1]

LETTERS PATENT passed under the Great Seal of the Realm constituting the office of Governor-General of India.

Dated 5th March 1937.

GEORGE THE SIXTH, by the Grace of God, of Great Britain, Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India :

To all to whom these Presents shall come

GREETING :

WHEREAS by Section 3 (1) of the Government of India Act, 1935 (hereinafter referred to as 'the Act'), it is enacted that the Governor-General of India is appointed by Us by a Commission under Our Sign Manual :

AND WHEREAS by the Act it is further enacted that the Governor-General has all such powers and duties as are conferred on him by or under the Act and such other powers belonging to Us, not being powers connected with the exercise of the functions of the Crown in its relations with Indian States, as We may be pleased to assign to him :

AND WHEREAS We are minded to make permanent provision for the office of Governor-General of India :

Now, Therefore, We do declare Our Will and Pleasure to be as follows :—

1. We do hereby constitute, order and declare that there shall be a Governor-General of India.

2. And We do hereby authorize and empower Our Governor-General in Our name and on Our behalf to grant to any offender convicted in the exercise of its criminal jurisdiction by any Court of Justice within Our territories in India a pardon, either free or subject to such lawful conditions as to him may seem fit.

3. And We do hereby delegate to Our Governor-General authority and power to grant in Our name or on Our behalf

[1] See *The Gazette of India*, Extraordinary, 1 April 1937, pp. 1-2.

Commissions in Our Naval Forces, Our Indian Land Forces and Our Indian Air Force.

4. After Part XIII of, and the Ninth Schedule to, the Act shall have ceased to have effect, one of Our Principal Secretaries of State may grant to Our Governor-General once during his term of office leave of absence from India for urgent reasons of public interest or of health or of private affairs. Such leave of absence shall not exceed four months in duration, unless Our Secretary of State shall see fit to extend the period so granted, in which case he shall set forth the reasons for the extension in a minute to be signed by himself and laid before both Houses of Parliament.

5. And We do hereby require and command all Our officers, civil and military, and all other the inhabitants of Our territories in India to be obedient, aiding and assisting unto Our said Governor-General.

6. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter or amend these Our Letters Patent as to Us or them shall seem meet.

7. Our Governor-General shall make public in India these Our Letters Patent in such manner as to him may seem fit.

IN WITNESS whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster the Fifth day of March in the First year of Our Reign.

By Warrant under the King's Sign Manual,

Signed/ Schuster.

APPENDIX B.[1]

LETTERS PATENT passed under the Great Seal of the Realm constituting the office of Crown Representative. Dated 5th March 1937.

GEORGE THE SIXTH, by the Grace of God, of Great Britain, Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To all to whom these Presents shall come

GREETING :

WHEREAS by Section 3 (2) of the Government of India Act, 1935 (hereinafter referred to as 'the Act') it is enacted that Our Representative for the exercise of Our functions in Our relations with Indian States is appointed by Us by a Commission under Our Sign Manual :

AND WHEREAS by the Act it is further enacted that any powers connected with the exercise of Our functions in Our relations with Indian States shall in India, if not exercised by Us, be exercised only by, or by persons acting under the authority of, Our said Representative, and that Our said Representative has such powers and duties in connexion with the exercise of those functions (not being powers or duties conferred or imposed by or under the Act on Our Governor-General) as We may be pleased to assign to him :

AND WHEREAS We are minded to make permanent provision for the office of Our Representative :

NOW, THEREFORE, We do declare Our Will and Pleasure to be as follows :—

1. We do hereby constitute, order and declare that there shall be a Representative of the Crown for the exercise of Our functions in Our relations with Indian States, hereinafter referred to as 'Our Representative'.

2. The person who is for the time being Our Governor-General or acting as Our Governor-General shall be also Our Representative.

[1] See *The Gazette of India*, Extraordinary, 1 April 1937, pp. 426-7.

3. And We do hereby authorize and empower Our Representative to exercise in India on Our behalf all powers and jurisdiction which have heretofore been exercisable in relation to Indian States on Our behalf by the Governor-General of India or the Governor-General in Council, whether with or without the sanction of the Secretary of State in Council of India, except so much of those powers and that jurisdiction as We may from time to time determine to retain in Our own hands or for which We may make other provision, and so much as may hereafter be vested, in the case of a Federated State, in Our Governor-General and other Federal authorities under the Act by virtue of the Instrument of Accession of the State.

4. Our Secretary of State may, to such extent as he may deem expedient, himself appoint persons to be employed in connexion with the exercise of Our functions in Our relations with Indian States, and Our Representative shall employ all persons so appointed. But subject as aforesaid and subject also to any directions which Our Secretary of State may signify to him in regard to the employment of any class of persons, Our Representative may on Our behalf employ or appoint all such officers and servants as may seem to him necessary for the due performance of his functions.

Our Representative may also by writing under his hand authorize the recruitment outside India and the appointment in his name by the person so authorized of any such officers as he may think expedient.

Further, Our Representative may empower authorities in India subordinate to him to exercise such of his powers and discharge such duties as he may from time to time deem fit.

5. Our Representative may further regulate the conditions of service of all officers and servants employed or appointed by him, or by authorities subordinate to him, subject, however, to the provisions of the Act in the case of persons wholly or mainly employed immediately before the commencement of Part III thereof in connexion with the exercise of Our functions in Our relations with Indian States.

6. We do further authorize and empower Our

Representative on Our behalf to purchase or acquire property whether within or without India for the purposes of the exercise of Our functions in Our relations with Indian States and to sell or to dispose of any property for the time being vested in Us for those purposes and to make, either himself or through such persons as he may authorize, any contract, whether within or without India, for those purposes.

7. Our Representative shall in the exercise of the powers and authorities conferred upon him by the Act and by these Letters Patent comply with any instructions which We may from time to time issue to him under Our Sign Manual and shall further be under the general control of, and comply with such particular directions, if any, as may from time to time be given to him by, Our Secretary of State.

8. And it is Our Will and Pleasure that the provisions contained in certain Letters Patent under the Great Seal bearing date at Westminster the Fifth day of March 1937, making provision for the Office of Our Governor-General for the grant of leave to Our Governor-General shall be taken as applying also to Our Representative, and that pending the coming into operation of that provision any orders passed under the Act for or in connexion with the grant of leave to Our Governor-General shall be taken as applying to Our Representative.

9. And We do hereby require and command all Our officers, civil and military, and all other the inhabitants of Our territories in India to be aiding and assisting unto Our Representative.

10. And We do hereby reserve to Ourselves, Our heirs and successors full power and authority from time to time to revoke, alter or amend these Our Letters Patent as to Us or them shall seem meet.

11. Our Representative shall make public in India these Our Letters Patent in such manner as to him may seem fit.

IN WITNESS whereof We have caused these Our Letters to be made Patent. Witness Ourselves, at Westminster the Fifth day of March in the First year of Our Reign.

By Warrant under the King's Sign Manual.

Signed/ SCHUSTER.

APPENDIX C.[1]

COMMISSION passed under the Royal Sign Manual and Signet appointing The Most Honourable the Marquess of Linlithgow, K.T., G.M.S.I., G.M.I.E., O.B.E., to be Governor-General of India and Crown's Representative.

Dated 8th March 1937.

Signed GEORGE R.I.

GEORGE THE SIXTH by the Grace of God of Great Britain Ireland and of the British Dominions beyond the Seas King, Defender of the Faith Emperor of India :

To Our Right Trusty and Right Well Beloved Cousin and Counsellor VICTOR ALEXANDER JOHN HOPE MARQUESS OF LINLITHGOW Knight of the Most Ancient and Most Noble Order of the Thistle Grand Master and First and Principal Knight of Our Most Exalted Order of the Star of India Grand Master and First and Principal Knight Grand Commander of Our Most Eminent Order of the Indian Empire Officer of Our Most Excellent Order of the British Empire.

GREETING :

I. We do by this Our Commission under Our Sign Manual appoint you the said Victor Alexander John Hope Marquess of Linlithgow to be during Our pleasure Our Governor-General of India and Our Representative for the exercise of Our functions in Our relations with Indian States with all the powers rights privileges and advantages to the said offices belonging or appertaining.

II. And We do hereby declare that so long as you shall hold the said offices you shall while in India bear in addition to the styles and titles of the said offices the style and title of 'Our Viceroy'.

III. And We do hereby authorize empower and command you to exercise and perform all and singular the powers and directions contained in certain Letters Patent under the

[1] See *The Gazette of India*, Extraordinary, 1 April 1937, p. 3.

Great Seal bearing date at Westminster the Fifth day of March 1937 making provision for the offices of Governor-General and of Our Representative or in any other Letters Patent adding to amending or substituted for the same according to such Orders and Instructions as Our Governor-General and Our Representative for the time being have already received or as you may hereafter receive from Us or from one of Our Principal Secretaries of State.

IV. And further We do hereby appoint that this Our present Commission shall supersede the Warrant under the Sign Manual of His former Majesty King Edward the Eight bearing date the Tenth day of March 1936 appointing you the said Victor Alexander John Hope Marquess of Linlithgow to be Our Governor-General of India.

V. And We do hereby command all and singular Our officers and loving subjects in India and all others whom it may concern to take due notice hereof and to give their ready obedience accordingly.

Given at Our Court at Buckingham Palace the Eight day of March 1937 in the First year of Our Reign.

By His Majesty's Command,

Signed ZETLAND.

APPENDIX D.

DRAFT INSTRUMENT OF INSTRUCTIONS TO THE GOVERNOR-GENERAL

WHEREAS by Letters Patent bearing even date We have made effectual and permanent provision for the Office of Governor-General of India :

AND WHEREAS by those Letters Patent and by the Act of Parliament passed on and entitled the Government of India Act, 1935 (hereinafter called 'the said Act'), certain powers, functions and authority for the government of India and of Our Federation of India are declared to be vested in the Governor-General as Our Representative :

AND WHEREAS, without prejudice to the provision in the said Act that in certain regards therein specified the Governor-General shall act according to instructions received from time to time from Our Secretary of State, and to the duty of Our Governor-General to give effect to any instructions so received, We are minded to make general provision regarding the manner in which Our said Governor-General shall execute all things which, according to the said Act and said Letters Patent, belong to his Office and to the trust which We have reposed in him :

AND WHEREAS by the said Act it is provided that the draft of any such Instructions to be issued to Our Governor-General shall be laid by Our Secretary of State before both Houses of Parliament :

AND WHEREAS both Houses of Parliament, having considered the draft laid before them accordingly, have presented to Us an Address praying that Instructions may be issued to Our Governor-General in the form which hereinafter follows :

NOW, THEREFORE, We do by these Our Instructions under Our Sign Manual and Signet declare Our pleasure to be as follows :

A.—Introductory

I. Under these Our Instructions, unless the context otherwise require, the term ' Governor-General ' shall include every person for the time being administering the Office of Governor-General according to the provisions of Our Letters Patent constituting the said Office.

II. Our Governor-General for the time being shall, with all due solemnity, cause Our Commission under Our Sign Manual, appointing him, to be read and published in the presence of the Chief Justice of India for the time being, or, in his absence, other Judge of the Federal Court.

III. Our said Governor-General shall take the oath of allegiance and the oath for the due execution of the Office of Our Governor-General of India, and for the due and impartial administration of justice, in the form hereto appended, which oaths the Chief Justice of India for the time being, or in his absence any Judge of the Federal Court, shall, and is hereby required to, tender and administer unto him.

IV. And We do authorize and require Our Governor-General, by himself or by any other person to be authorized by him in that behalf, to administer to every person appointed by him to hold office as a member of the Council of Ministers the oaths of office and of secrecy hereto appended.[1]

V. And We do further direct that every person who under these Instructions shall be required to take an oath may make an affirmation in place of an oath if he has any objection to making an oath.

VI. And whereas great prejudice may happen to Our service and to the security of India by the absence of Our Governor-General, he shall not quit India during his term of office without having first obtained leave from Us under Our Sign Manual or through one of Our Principal Secretaries of State.

[1] The forms of oath are here omitted.

B.—In Regard to the Executive Authority of the Federation

VII. Our Governor-General shall do all that in him lies to maintain standards of good administration; to encourage religious toleration, co-operation and goodwill among all classes and creeds; and to promote all measures making for moral, social and economic welfare.

VIII. In making appointments to his Council of Ministers Our Governor-General shall use his best endeavours to select his Ministers in the following manner, that is to say, in consultation with the person who, in his judgement, is most likely to command a stable majority in the Legislature, to appoint those persons (including so far as practicable representatives of the Federated States and members of important minority communities) who will best be in a position collectively to command the confidence of the Legislature. But, in so acting, he shall bear constantly in mind the need for fostering a sense of joint responsibility among his Ministers.

IX. In all matters within the scope of the executive authority of the Federation, save in respect of those functions which he is required by the said Act to exercise in his discretion, Our Governor-General shall in the exercise of the powers conferred upon him be guided by the advice of his Ministers, unless in his opinion so to be guided would be inconsistent with the fulfilment of any of the special responsibilities which are by the said Act committed to him, or with the proper discharge of any of the functions which he is otherwise by the said Act required to exercise on his individual judgement; in any of which cases Our Governor-General shall, notwithstanding his Ministers' advice, act in exercise of the powers by the said Act conferred upon him in such manner as to his individual judgement seems requisite for the due discharge of the responsibilities and functions aforesaid. But he shall be studious so to exercise his powers as not to enable his Ministers to rely upon his special responsibilities in order to relieve themselves of responsibilities which are properly their own.

X. It is Our will and pleasure that in the discharge of his special responsibility for safeguarding the financial

stability and credit of the Federation Our Governor-General shall in particular make it his duty to see that a budgetary or borrowing policy is not pursued which would, in his judgement, seriously prejudice the credit of India in the money markets of the world, or affect the capacity of the Federation duly to discharge its financial obligations.

XI. Our Governor-General shall interpret his special responsibility for the safeguarding of the legitimate interests of minorities as requiring him to secure, in general, that those racial or religious communities for the members of which special representation is accorded in the Federal Legislature, and those classes who, whether on account of the smallness of their number or their lack of educational or material advantages or from any other cause, cannot as yet fully rely for their welfare on joint political action in the Federal Legislature, shall not suffer, or have reasonable cause to fear, neglect or oppression. But he shall not regard as entitled to his protection any body of persons by reason only that they share a view on a particular question which has not found favour with the majority.

Further, Our Governor-General shall interpret the said special responsibility as requiring him to secure a due proportion of appointments in Our Services to the several communities, and he shall be guided in this regard by the accepted policy prevailing before the issue of these Our Instructions, unless he is fully satisfied that modification of that policy is essential in the interests of the communities affected or of the welfare of the public.

XII. In the discharge of his special responsibility for the securing to members of the public services of any rights provided for them by or under the said Act, and the safeguarding of their legitimate interests Our Governor-General shall be careful to safeguard the members of Our Services not only in any rights provided for them by or under the said Act or any other law for the time being in force, but also against any action which, in his judgement, would be inequitable.

XIII. The special responsibility of Our Governor-General for securing in the sphere of executive action any of

the purposes which the provisions of Chapter III of Part V of the said Act are designed to secure in relation to legislation shall be construed by him as requiring him to differ from his Ministers if in his individual judgement their advice would have effects of the kind which it is the purpose of the said Chapter to prevent, even though the advice so tendered to him is not in conflict with any specific provision of the said Act.

XIV. In the discharge of his special responsibility for the prevention of measures which would subject goods of United Kingdom origin imported into India to discriminatory or penal treatment, Our Governor-General shall avoid action which would affect the competence of his Government and of the Federal Legislature to develop their own fiscal and economic policy, or would restrict their freedom to negotiate trade agreements whether with the United Kingdom or with other countries for the securing of mutual tariff concessions; and he should intervene in tariff policy or in the negotiation of tariff agreements only if, in his opinion, the main intention of the policy contemplated is, by trade restrictions to injure the interests of the United Kingdom rather than to further the economic interests of India. And We require and charge him to regard the discriminatory or penal treatment covered by this special responsibility as including both direct discrimination (whether by means of differential tariff rates or by means of differential restrictions of imports) and indirect discrimination by means of differential treatment of various types of products: and Our Governor-General's special responsibility extends to preventing the imposition of prohibitory tariffs or restrictions, if he is satisfied that such measures are proposed with the aforesaid intention. It also extends, subject to the aforesaid intention, to measures which, though not discriminatory or penal in form, would be so in fact.

At the same time in interpreting the special responsibility to which this paragraph relates Our Governor-General shall bear always in mind the partnership between India and the United Kingdom within Our Empire which has so long subsisted and the mutual obligations which arise therefrom.

XV. Our Governor-General shall construe his special responsibility for the protection of the rights of any Indian State as requiring him to see that no action shall be taken by his Ministers, and no Bill of the Federal Legislature shall become law, which would imperil the economic life of any State, or affect prejudicially any right of any State heretofore or hereafter recognized, whether derived from treaty, grant, usage, sufferance, or otherwise, not being a right appertaining to a matter in respect to which, in virtue of the Ruler's Instrument of Accession the Federal Legislature may make laws for his State and his subjects.

XVI. In the framing of rules for the regulation of the business of the Federal Government Our Governor-General shall ensure that amongst other provisions for the effective discharge of that business, due provision is made that the Minister in charge of the Finance Department shall be consulted upon any proposal by any other Minister which affects the finances of the Federation : and further that no reappropriation within a Grant shall be made by any Minister otherwise than after consultation with the Finance Minister ; and that in any case in which the Finance Minister does not concur in any such proposal the matter shall be brought for decision before the Council of Ministers.

XVII. Although it is provided in the said Act that the Governor-General shall exercise his functions in part in his discretion and in part with the aid and advice of Ministers, nevertheless it is Our will and pleasure that Our Governor-General shall encourage the practice of joint consultation between himself, his Counsellors and his Ministers. And seeing that the Defence of India must to an increasing extent be the concern of the Indian people it is Our will in especial that Our Governor-General should have regard to this instruction in his administration of the Department of Defence ; and notably that he shall bear in mind the desirability of ascertaining the views of his Ministers when he shall have occasion to consider matters relating to the general policy of appointing Indian officers to Our Indian Forces, or the employment of Our Indian Forces on service outside India.

XVIII. Further, it is Our will and pleasure that, in

the administration of the Department of Defence, Our Governor-General shall obtain the views of Our Commander-in-Chief on any matter which will affect the discharge of the latter's duties, and shall transmit his opinion on such matters to Our Secretary of State whenever the Commander-in-Chief may so request on any occasion when Our Governor-General communicates with Our Secretary of State upon them.

XIX. And We desire that, although the financial control of Defence administration must be exercised by the Governor-General at his discretion, nevertheless the Federal Department of Finance shall be kept in close touch with this control by such arrangement as may prove feasible, and that the Federal Ministry and, in particular, the Finance Minister shall be brought into consultation before estimates of proposed expenditure for the service of Defence are settled and laid before the Federal Legislature.

C.—In Regard to Relations Between the Federation, Provinces and Federated States

XX. Whereas it is expedient, for the common good of Provinces and Federated States alike, that the authority of the Federal Government and Legislature in those matters which are by law assigned to them should prevail :

And whereas at the same time it is the purpose of the said Act that on the one hand the Governments and Legislatures of the Provinces should be free in their own sphere to pursue their own policies, and on the other hand that the sovereignty of the Federated States should remain unaffected save in so far as the Rulers thereof have otherwise agreed by their Instruments of Accession :

And whereas in the interest of the harmonious co-operation of the several members of the body politic the said Act has empowered Our Governor-General to exercise at his discretion certain powers affecting the relations between the Federation and Provinces and States :

It is Our will and pleasure that Our Governor-General, in the exercise of these powers, should give unbiased consideration as well to the views of the Governments of Provinces

and Federated States as to those of his own Ministers, whenever those views are in conflict and, in particular, when it falls to him to exercise his power to issue orders to the Governor of a Province, or directions to the Ruler of a Federated State, for the purpose of securing that the executive authority of the Federation is not impeded or prejudiced, or his power to determine whether provincial law or federal law shall regulate a matter in the sphere in which both Legislatures have power to make laws.

XXI. It is Our desire that Our Governor-General shall by all reasonable means encourage consultation with a view to common action between the Federation, Provinces and Federated States. It is further Our will and pleasure that Our Governor-General shall endeavour to secure the co-operation of the Governments of Provinces and Federated States in the maintenance of such Federal agencies and institutions for research as may serve to assist the conduct by Provincial Governments and Federated States of their own affairs.

XXII. In particular We require our Governor-General to ascertain by the method which appears to him best suited to the circumstances of each case the views of Provinces and of Federated States upon any legislative proposals which it is proposed to introduce in the Federal Legislature for the imposition of taxes in which Provinces or Federated States are interested.

XXIII. Before granting his previous sanction to the introduction of a Bill into the Federal Legislature imposing a Federal surcharge on taxes on income, Our Governor-General shall satisfy himself that the results of all practicable economies and of all practicable measures for increasing the yield accruing to the Federation from other sources of taxation within the powers of the Federal Legislature would be inadequate to balance Federal receipts and expenditure on revenue account ; and among the aforesaid measures shall be included the exercise of any powers vested in him in relation to the amount of the sum retained by the Federation out of moneys assigned to the Provinces from taxes on income.

XXIV. Our Governor-General, in determining whether

the Federation would or would not be justified in refusing to make a loan to a Province, or to give a guarantee in respect of a loan to be raised by a Province, or in imposing any conditions in relation to such loan or guarantee, shall be guided by the general policy of the Federation for the time being as to the extent to which it is desirable that borrowings on behalf of the Provinces should be undertaken by the Federation; but such general policy shall not in any event be deemed to prevail against the grant by the Federation of a loan to a Province or a guarantee in respect of a loan to be raised by that Province, if in the opinion of Our Governor-General a temporary financial emergency of a grave character has arisen in a Province, in which refusal by the Federation of such a grant or guarantee would leave the Province with no satisfactory means of meeting such temporary emergency.

XXV. Before granting his previous sanction to the introduction into the Federal Legislature of any Bill or amendment wherein it is proposed to authorize the Federal Government to give directions to a Province as to the carrying into execution in that Province of any Act of the Federal Legislature relating to a matter specified in Part II of the Concurrent Legislative List appended to the said Act, it is Our will and pleasure that Our Governor-General should take care to see that the Governments of the Provinces which would be affected by any such measure have been duly consulted upon the proposal, and upon any other proposals which may be contained in any such measure for the imposition of expenditure upon the revenues of the Provinces.

XXVI. In considering whether he shall give his assent to any Provincial law relating to a matter enumerated in the Concurrent Legislative List, which has been reserved for his consideration on the ground that it contains provisions repugnant to the provisions of a Federal law, Our Governor-General, while giving full consideration to the proposals of the Provincial Legislature, shall have due regard to the importance of preserving substantially the broad principles of those Codes of law through which uniformity of legislation has hitherto been secured.

D.—Matters Affecting the Legislature

XXVII. Our Governor-General shall not assent in Our name to, but shall reserve for the signification of Our pleasure, any Bill of any of the classes herein specified, that is to say :

(*a*) any Bill the provisions of which would repeal or be repugnant to the provisions of any Act of Parliament extending to British India ;

(*b*) any Bill which in his opinion would, if it became law, so derogate from the powers of the High Court of any Province as to endanger the position which these Courts are by the said Act designed to fill ;

(*c*) any Bill passed by a Provincial Legislature and reserved for his consideration which would alter the character of the Permanent Settlement ;

(*d*) any Bill regarding which he feels doubt whether it does, or does not, offend against the purposes of Chapter III, Part V of the said Act.

XXVIII. It is further Our will and pleasure that if an Agreement is made with His Exalted Highness the Nizam of Hyderabad as contemplated in Part III of the said Act, Our Governor-General in notifying his assent in Our name to any Act of the Legislature of the Central Provinces and Berar which has been reserved for his consideration, shall declare that his assent to the Act in its application to Berar has been given on Our behalf and in virtue of the provisions of Part III of the said Act in pursuance of the Agreement between Us and His Exalted Highness the Nizam.

XXIX. It is Our will that the power vested by the said Act in Our Governor-General to stay proceedings upon a Bill, clause or amendment in the Federal Legislature in the discharge of his special responsibility for the prevention of grave menace to peace and tranquillity shall not be exercised unless, in his judgement, the public discussion of the Bill, clause or amendment would itself endanger peace and tranquillity.

XXX. It is Our will and pleasure that, in choosing

representatives of British India for the seats in the Council of State which are to be filled by Our Governor-General by nominations made in his discretion, he shall, so far as may be, redress inequalities of representation which may have resulted from election. He shall, in particular, bear in mind the necessity of securing representation for the Scheduled Castes and women; and in any nominations made for the purpose of redressing inequalities in relation to minority communities (not being communities to whom seats are specifically allotted in the Table in the First Part of the First Schedule to the said Act) he shall, so far as may seem to him just, be guided by the proportion of seats allotted to such minority communities among the British Indian representatives of the Federal Assembly.

E.—General

XXXI. And finally, it is Our will and pleasure that Our Governor-General should so exercise the trust which We have reposed in him that the partnership between India and the United Kingdom within Our Empire may be furthered, to the end that India may attain its due place among Our Dominions.

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